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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

CHRISTOPHER SPIERER; MARION SPIERER,
Petitioners,

v.

FEDERATED DEPARTMENTAL STORES, INC.;
ALLIED STORES CORPORATION;
BLOOMINGDALES DEPARTMENT STORES, INC.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has been careful to distinguish private rights, between individuals, from public rights, between the government and others. The powers of Congress to create and administer public rights, does not extend to the adjudication of private rights. In particular, the Constitutional powers granted to Congress to establish uniform bankruptcy laws, do not confer Article 111 jurisdiction on US bankruptcy judges to determine private rights. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 US 50, 71-72. Following *Northern Pipeline*, *supra*, Congress fashioned strict statutory restrictions prohibiting Bankruptcy judges from adjudicating on personal injury claims as core proceedings in bankruptcy. *See* 28 U.S.C. Sec. 157 (b)(2)(B) and (O); and permitted only the US District Court to enter orders in related non- core proceedings. *See* 28 U.S.C. Sec. 157 (c)(1).[1]

This Court has also recognized the limited jurisdiction of US Courts in general and the presumption against the exercise of such jurisdiction, "unless the contrary appears from the record." *Bors v. Preston*, 111 US 252, 255.

In the decision below, however, the United States Court of Appeals for the Sixth Circuit did not find it necessary to consider specific Congressional restrictions on bankruptcy judges when determining jurisdictional excess, since it interpreted 11 U.S.C. 105 (a) of the Bankruptcy Code as a general grant of jurisdiction to such judges to issue any order

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[1] "The term 'core proceedings' was actually adopted by Congress.....to comprise those matters which constitute 'public rights' created by Federal Statute as opposed to state created 'private rights.'" *In re Royal*, 197 BR 341, 347-348

to carry out the Code's provisions. Specific statutory restrictions were deemed non- jurisdictional factors which could be waived. As a result, the Court of Appeals applied only a constitutional test for jurisdictional excess, where a bankruptcy judge intervened in state court personal injury proceedings against a debtor's insurer. The Court of Appeals was confronted with the actions of a bankruptcy judge who entered an order staying subrogated state claims on the eve of trial, and imposing non- binding ADR adjudication, failing which, referral to out- of- state Federal courts for determination. Prior to these actions, a) the insurer had agreed to payment of state court personal injury liability, b) the original bankruptcy judge determined the subrogated claims were not part of the bankruptcy reorganization, permitting them to proceed to finality and collection from the insurer in the state court, without further reference to the US courts, and, c) the subsequently confirmed reorganization plan provided that its implementation did not effect the enforcement of the private rights against the insurer.

In applying only a constitutional test for jurisdictional excess, the Court of Appeals found no encroachment on Article 111 court powers, since intervention in state court proceedings resulted in "minimal interference" with private rights, merely delaying the timing of their enforcement. Thus petitioners respectfully request that certiorari be granted on the following questions:

Whether the Court of Appeal's interpretation of 11 U.S.C. 105 (a) as a general grant of jurisdiction to bankruptcy judges and its application of a constitutional test for jurisdictional excess, without reference to statutory restrictions ; ***a)*** aggrandized such jurisdiction and subverted Congressional restraints on such judges, ***b)*** undermined state court jurisdiction and the enforcement of private rights?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Christopher and Marion Spierer are a husband and wife, both of whom have been adjudicated as disabled under Title 11 of the US Social Security Act as a result of Respondents' alleged wrongdoing.

The Respondents are reconstructed debtors, Federated Department Stores Inc., Allied Stores Corporation and Bloomingdales Inc. Respondents were debtors/ appellees in the underlying proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Christopher and Marion Spierer, respectfully petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the Sixth Circuit (the "Court of Appeals").

OPINIONS BELOW

The opinion of the Court of Appeals (at *infra* 1a *et seq.*) is reported at 328 F 3rd. 829. The Court of Appeals addressed Petitioners' appeal from the May 18th. 2001 order of the US Bankruptcy Court refusing to lift a reimposed judicial stay on their New York State actions against Respondents' insurer (*infra* at page 6a). In doing so the Court of Appeals also reviewed for jurisdictional defect, the January 8th. 1997 order of the Bankruptcy Court which imposed the judicial stay in question and directed non- binding ADR resolution of Petitioners' state claims, failing which referral to the Ohio Federal Courts for adjudication.

The Court of Appeals vacated the District Court's October 31st. 2001 order dismissing Petitioners' appeal (*infra* at page 18a) but affirmed the Bankruptcy Court's orders.

STATEMENT OF JURISDICTION

The Court of Appeals' order was entered on May 14th. 2003. Petitioners filed a timely petition for rehearing and/ or rehearing en banc on May 27th. 2003. The Court of Appeals denied on July 9th. 2003, *infra* at page 16a) This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 105 (a) of the Bankruptcy Code, 11 U.S.C. Section 105 (a) provides;

Sec. 105. Power of Court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals interpreted 11 U.S.C. 105 (a), as a general grant of jurisdiction to bankruptcy judges and considered specific statutory restrictions on their actions as non- jurisdictional factors which could be waived if not objected to. These restrictions were deemed waived in the instant case, resulting in the application only of an effects based constitutional test, for jurisdictional excess.

The Sixth Circuit's interpretation of 11 U.S.C. 105 (b) conflicts with the interpretation of it by the Second, Third and Fifth Circuits, which did not find that 11 U.S.C. 105 (a) conferred general jurisdiction on bankruptcy judges. These Circuits require independent subject matter jurisdiction to exist before actions pursuant to its provisions are considered valid. *See Matter of Zale Corporation*, 62 F 3rd. 746, 751 (Fifth Cir); *In re Davis*, 730 F 2nd. 176, 183, 184 (Fifth Cir); *Matter of Davis: Davis v. Sheldon*, 691 F 2nd. 176,178; (Third

Cir.); *In re Johns- Manville Corp.*, 801 F. 2nd 60, 63 (Second Cir.)[2] . *See also In re Jacksen*, 105 BR 542, 544.[3]

The Fifth Circuit's analysis of 11 U.S.C. 105 (a) draws a distinction between the general "powers" referred to in the section and subject matter jurisdiction, which is fact specific. *See, Matter of Zale Corp., supra*, 751. According to this analysis, statutory restrictions on bankruptcy judges are jurisdictional factors which cannot be waived.

The Sixth Circuit Court of Appeals' interpretation of 11 U.S.C. 105 (a) as a jurisdictional grant, necessitates a single constitutional test, where, as in the instant case, statutory restrictions are deemed waived. While it may be important to apply an effects based constitutional test for encroachments on Article 111 court powers in ***addition*** to statutory tests, its application as a ***sole*** test for jurisdictional excess undermines important Congressional powers. Congress, which created bankruptcy judges,[4] has also the power to impose its own specific limitations on their jurisdiction. *See, United States v. Hudson & Godwin*, 11 US (7 Cranch) *32, *33. Like Congressional diversity jurisdiction limitations, such statutory restrictions must be considered and the record scrutinized for

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[2] These cases considered bankruptcy stays on both state civil and criminal proceedings.

[3] Where 11 U.S.C. 105 (a) was considered similar in effect to the All Writs Act, (28 U.S.C. 1651), creating no independent jurisdiction. *See In re S.T.R. Corp.*, 66 BR 49, 51.

[4] As "units" and officers of the District Court; 28 U.S.C. 151 - "for the convenience of the district courts. Whether they are called referees or judges, they are essentially masters in chancery." *See Centrust Savings Bank v. Love*, 131 BR 64,65.

jurisdictional excess. *See Mitchell v. Maurer*, 293 US 237, 242, 244.

In the instant case, the Court of Appeals interpretation of 11 U.S.C. 105 (a) as the basis of bankruptcy judge jurisdiction, precluded, as deemed waived, any inquiry into whether the state subrogated claims were "core proceedings" in the bankruptcy reorganization, as defined by Congress in 28 U.S.C. 157 (b)(2)(A), (B) or (O). The determination of a prior bankruptcy judge that state actions against the insurer did not form part of respondent/ debtors' Chapter 11 reorganization and the subsequent protections for such claims in the later reorganization plan, indicated that such claims did not form part of "core proceedings" in the bankruptcy. Even viewed as a related "non- core proceeding", Congress specifically prohibits bankruptcy judges from entering any order in such matters without prior consent of all parties to a District Court referral to do so. *See* 28 U.S.C. 157 (c)(1) and (2). No such consent for referral existed in the present case.[5]

Failure to consider Congressional restrictions as jurisdictional factors, also precluded consideration in the instant case of the application of the Congressional Anti-Injunction Act (28 U.S.C. 2283) to the bankruptcy judge's state court stay. In order to determine whether the provisions 11 U.S.C. 105 (a) creates an exemption to the Act in specific cases, a factual search of the record, including consideration of relevant statutory restrictions, is required, to determine if a stay was "properly" imposed. *See, Davis v. Sheldon, supra*, at 177-178, and Footnote 5 ; *In re Baptist Medical Center of*

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[5] As appears from the Factual Background, *infra*, page 7, the claims included multiple state defendants.

New York, 80 BR 637, 641. This approach conforms to the interpretation that 11 U.S.C. 105(a) does not confer a general grant of jurisdiction on bankruptcy judges. *See, In re S.T.R. Corp*, 66 BR 49, 51; *In re Professional Sales Corp*, 56 BR 753,762; *In re Jacksen*, 105 BR 542, 544

Similarly precluded in the instant case, as waived, was any inquiry into whether Congress had in fact authorized bankruptcy judges to employ alternative dispute resolution procedures. At the time of the order in question, namely January 9th 1997, no Congressional authority existed for such procedures. Congress ended its five year experiment with ADR procedures in the District Court in 1994 when it repealed 28 U.S.C. Secs. 651- 658. Congress only re- enacted the use of such procedures in the District Court in 1998. Indeed, controversy still exists as to whether or in what circumstances bankruptcy judges have jurisdiction to employ such procedures.[6]

The jurisdiction of the state court in question was also undermined by the Court of Appeals interpretation of 11 U.S.C. 105 (a) and its non- jurisdictional approach to statutory restrictions. State courts do not forfeit jurisdiction over pending actions by the filing of a petition for bankruptcy protection in the US Bankruptcy Court. A Chapter 11 bankruptcy filing, vests bankruptcy judges with jurisdiction to accomplish a restructuring of a debtor's finances. In

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[6] *See* Moore's "Federal Practice: Guide to Judicial Management of Cases in ADR" (Federal Judicial Center Publication) pages 4 to 6. The ADR procedures ordered in January 1997 were devised by respondent/ debtors and did not conform to past and present procedural requirements or monetary limits authorized by Congress. For the present requirements, *see* 28 U.S.C. 654 (b)(1) and 654 (b)(2).

essence such judges are masters in chancery and appendages to the District Court. *See, Centrust Savings Bank v. Love*, 131 BR 64,65. Apart from an initial automatic stay, state courts retain concurrent jurisdiction with the US District Court, over pending actions. *See*, 28 U.S.C. 1334 (b). State court jurisdiction continues unless a notice of removal of the state case to the District Court is filed under 28 U.S.C. 1452 in the District Court. The record of the instant case indicates that no notice of removal was filed.

Following the prior determination that the subrogated claims against the insurer did not form part of the bankruptcy reorganization, the determination of the timing and procedures for enforcing the such claims was a matter for the state court to determine, not the bankruptcy judge. *See, In re Jeffries*, 191 BR 861, 863. Deferring the enforcement of such claims and directing other adjudication procedures, also subverted Congressional policy giving state claimants the right to have private claims heard in state courts. *See In re Castlerock Properties*, 781 F.2nd 159, 163 (C. of A. 9th. Cir.). As a practical matter, the nature of both the delay and procedures imposed by the bankruptcy judge, seriously undermined petitioners' rights to litigate their complex tort claims, due to the effects on evidence and witnesses.[7] *See In re Bock*

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[7] The Bankruptcy judges' order made no provision for the return of the claims to the New York State Supreme court for adjudication, following the failure of the non- binding ADR procedures. In such circumstances the claims were to be referred for adjudication to either the same Ohio Bankruptcy judge who issued the order, (or his successor), or to the Ohio District Court, and faced additional problems of delay from congested Federal court dockets. *See infra*, at page 35a, para. 13. But see also, *Centrust Savings Bank, supra*, at 66 , finding that no bankruptcy judge has authority to refer matters to the District Court. In essence

Laundry Machines Co., 37 BR 564,566. This Court has also addressed this issue in *Clinton v. Jones*, 520 US 681, 707-708.

FACTUAL BACKGROUND

Petitioners Christopher and Marion Spierer were exposed to a range of highly toxic chemicals in a defective mattress purchased from Bloomingdales [8]. As a result they brought separate personal injury actions in 1987 in the New York State Supreme Court against **a)** Federated Department Stores, and Bloomingdales, (respondents herein): **b)** Simmons USA, (manufacturer): **c)** Sternberger Warehouse Ltd, (storage company): **d)** Sternberger Motor Corp. and Milton Goris Delivery Service, Inc., (delivery companies).

In January 1990, respondents Federated and Bloomingdales filed a petition for Chapter 11 bankruptcy protection in the US Bankruptcy Court, Southern District of Ohio and an automatic stay pursuant to 11 U.S.C. 362(a) was imposed on all pending litigation. The bankruptcy was caused by an accumulation of business and commercial claims, but a relatively small number of personal injury claims, such as petitioners, also existed, These latter claims were insured by respondent/ debtor's insurer, Liberty Mutual Insurance Co. The relatively few personal injury claims did not exhaust the insurance coverage. In June 1990, Ohio bankruptcy judge Vincent Aug determined that the claims against the insurer did not form any part of respondent/ debtors' Chapter 11

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the order constituted an improper removal of the cases from state court adjudication.

[8] The chemicals included, *inter alia,* hexachlorobenzine, toluene and formaldehyde.

bankruptcy reorganization, and accordingly annulled the automatic stay, permitting Petitioners' subrogated claims against the insurer "to proceed as usual" in the state court to liquidation and collection of payment from Liberty Mutual of "any settlements or judgements insured by Liberty Mutual". In addition, he ordered details of the insurance cover to be supplied the insured personal injury claimants.[9]

Pursuant to the bankruptcy judge's order, (which was not appealed) Liberty Mutual provided a written undertaking to petitioners in October 1990 to be responsible within the terms of the policy, for the payment of any "compromise, settlement or litigation judgement" in the state court action. The bankruptcy court subsequently confirmed a plan of reorganization, with effect from February 1992, which exempted private claims against debtors' insurer from its provisions and discharged respondents.

Following the annulment of the automatic stay, petitioners proceeded with their New York State actions. Their then New York attorneys of record spent over $45,000 in trial preparation, including reports from medical and scientific experts. A jury was requested and the matter was placed on the state trial- ready calendar in 1996. However in December 1996 respondents filled an adversary motion before a different bankruptcy judge in Ohio, namely, Burton Perlman, for

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[9] The automatic stay on the uninsured business and commercial claims in the Chapter11 reorganization, was only partially lifted, permitting them to proceed to liquidation in the relevant courts but postponing collection until a plan of reorganization had been developed and confirmed by the bankruptcy court, containing complex provisions for determining amounts of stock and cash distributions, per class of uninsured claim.

permission to refer all "unresolved personal injury claims" to alternative dispute resolution procedures (ADR), as well as any other such claims, "at their sole discretion", which they might later discover. No notice of motion or accompanying papers were served on petitioners' then New York attorneys, though they had filed a notice of appearance with the bankruptcy court at the outset of the bankruptcy proceedings in 1990. [10]

Consequently they did not appear in Cincinnati, Ohio on the January 8th. 1997, the hearing date of the motion, to contest it. On the afternoon of that date bankruptcy judge Perlman filed a voluminous order, ***a***) judicially staying all insured personal injury claims: ***b***) approving in its entirety a lengthy set of ADR procedures devised by respondents, including non- binding arbitration: ***c***) authorizing respondents to implement the procedures, with ADR notices to all parties within 60 days: ***d***) dismissing, ("disallowing") all personal injury claims where no "proper" response offer to settle was received within 30 days of the ADR notices: ***e***) referring all

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[10] So far as is known, only one the legal representative of personal injury claimants received prior notice of the adversary motion and by timely objection was "excused" from compliance with the subsequent order. It was thus an unreasonable gloss on the facts for the Court of Appeals to assert that the bankruptcy court "simply gave the parties notice of the proposed ADR procedure" permitting those who objected to opt out (*See infra* at page 10a, footnote 2) In fact the record discloses that the authorized procedures were so voluminous that the parties were only to be supplied with a full copy ***after it had been entered as an order***. Respondents were ordered to supply a full copy of its provisions within 60 days of entry. The record further indicates that Respondents took almost two years to supply petitioners' then attorneys with a complete copy of the procedures in question.

personal injury claims to Perlman, (or his successor) or the Ohio District Court for litigation on 10 days notice, following failure of the non- binding arbitration procedures. (Late notices made any non- binding arbitration determinations, "binding")

As a result, petitioners state court actions were halted and petitioners, together with all state defendants, were compelled to participate in the ADR procedures devised by respondents and authorized by the bankruptcy judge.[11]

Following a failure to accomplish a resolution of petitioners' personal injury claims during the mediation phase of the ADR procedures, the parties moved on to the non-binding arbitration stage before an arbitrator, (specifically required by the order, to be "experienced in **commercial law**"). This phase of the procedure broke down for several reasons.

The attorneys for bedding manufacturer, (Simmons) wished to cross examine petitioners in person during arbitration. But petitioners' health had steadily deteriorated and in the year of the ADR order, 1997, they were both adjudged disabled under Title 11 of the US Social Security

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[11] Due to the order's threat to dismiss the state claims for non-compliance, petitioners' then attorneys attempted to participate in the ADR procedures. State defendants Milton Goris Delivery Services and Sternberger Motor Corp. initially refused, but also subsequently complied. The state court, meanwhile, ordered that should the judicial stay be lifted, petitioners' claims could be restored to the court's trial- ready calendar within 9 months thereof.

Act as a result of their exposure to the toxic chemicals in question.[12]

One of the severe conditions covered in the disability order, which they both developed, was a reactions to certain chemicals, including medications and perfumes, which triggered seizures This circumscribed and restricted their daily activities. Their then attorneys of record obtained an agreement amongst the parties to hold the arbitration phase at a chemically safe location. But after such a location had been obtained, the defendants refused to attend.

Petitioners' then attorneys moved bankruptcy judge Perlman, in August 1999, *inter alia*, for relief from the non-binding "commercial" arbitration phase of his order on their personal injury clams. This was refused and petitioners then attorneys of record subsequently withdrew from the case as their legal representatives.

The commercial arbitrator, then ordered video conferencing appearances at a cost to petitioners of $500 per hour which petitioners were unable to afford. In January 2001, petitioners retained their present counsel of record who moved bankruptcy judge Perlman to lift the stay on their state court actions.

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[12] Petitioners developed a series of severe medical conditions, including musculoskeletal, neurological and respiratory problems due to their chemical exposure. US Administrative Judge Arthur S. Adler, accordingly found, on the basis of 20 medical and laboratory reports, that their condition was linked to chemical exposure and that they were disabled as a result. Petitioners accordingly received a total monthly disability income of $2,154.

This was refused on May 2001. The matter was appealed to the US District Court for the Southern District of Ohio, which denied the appeal in October 2001.A further appeal to the US Court of Appeals for the Sixth Circuit, vacated the District Court's dismissal, but denied the appeal in a reported decision in May 2003 and denied rehearing *en banc*, in July 2003.

PROCEEDINGS BELOW

A. Bankruptcy Court Proceedings

i) The June 12th. 1990 Order of Judge Aug

After filing for Chapter 11 protection in January 1990 respondents moved, *inter alia*, for the confirmation of a plan for the resolution of insured litigated claims. In a June 12th. 1990 order, US bankruptcy judge Vincent Aug denied this application on the basis that claimants were provided with little or no information with which to assess the fairness of the plan's proposals.[13] This lack of information was described in the order as "an underlying theme". The judge specifically found that the insurance companies concerned ***"were not part of this [Chapter 11] reorganization"*** and ordered respondent debtors to provide insured claimants with details of the insurance policies "without delay". He then annulled the automatic stay on all subrogated claims against respondent/debtors' insurers and authorized them to proceed to liquidation and payment by the insurers without further

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[13] These proposals mainly concerned the relatively small number of insured personal injury claims, which did not exhaust the available insurance cover, since this was a commercial, not a mass- tort bankruptcy.

reference to the bankruptcy court. This order was not appealed by respondents or vacated. By letter of October 15 1990, Liberty Mutual undertook liability to petitioners for payment of their state subrogated claims. The Bankruptcy court subsequently approved a plan of reorganization in February 1992 which specifically exempted from its implementation, the enforcement of private actions against respondent /debtors' insurance carriers.

ii)The January 9th. 1997 Order of Judge Perlman

This order was sought by respondents on motion from a different bankruptcy judge. It stayed the New York state court personal injury actions against their insurers, imposed non- binding ADR procedures, failing which, resolution thereof by the same Ohio bankruptcy judge or the Ohio District court. The order effectively precluded state court adjudication of the claims.

The bankruptcy judge claimed jurisdiction for the order under; ***a)*** 28 U.S.C. 157(b)(2)(A) (relating to the administration of the estate);
b) 28 U.S.C. 157(b)(2)(B) (which, in the post- plan confirmation context, could only refer to the prohibited liquidation of personal injury claims for distribution);
c) 28 U.S.C. 157(b)(2)(O) (relating to other proceedings affecting distribution of estate assets ***except*** those relating to personal injury claims) and;
d) 28 U.S.C. 1334 (granting the US District court concurrent jurisdiction with the state court). *See infra* at page 31a.

None of the above conferred jurisdiction on the bankruptcy judge over the state subrogated claims against respondents insurer. The unappealed June 12th. 1990 order of

bankruptcy judge Aug, determined that these claims were not part of respondents' Chapter 11 reorganization and the 1992 plan of reorganization specifically exempted them from its implementation. As personal injury claims, Congress, under ***b)*** and ***c)*** above, expressly prohibited bankruptcy courts from determining them. Any concurrent jurisdiction under ***d)*** above, vested exclusively in the District Court and does not automatically transfer to the bankruptcy court. *See Centrust Bank v. Love*, 131 BR 64, 67.

While the estate was liable for a possible contingent distribution for any uninsured deductible on the insured claims, the plan made specific provision for both estimating and ascertaining such a contingency distribution. This was not based on the resolution of the subrogated state claims but on the amount of legal fees and disbursements incurred by respondents' insurer in defending both of petitioners' claims.[14] Even viewed as a related non- core issue, only the US District Court could deal with such matters, absent specific prior consent for referral to a Bankruptcy judge. *See* 28 U.S.C. Sec 157 (c)(1) and (2).

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[14] This contingent distribution was assessed under the plan as, at most, $250,000, (the insurer's liability letter to respondents assessed the deductible at $200,000.) The claims of both petitioners were treated in bankruptcy as one claim against the estate. The confirmed plan however, provided that liability for the contingent distribution was extinguished when the insurer's legal fees and disbursements in the subrogated state actions reached $250,000 At the time of the order, the insurer had been defending the two separate complex toxic tort actions in the state court for approximately ten years. A very modest combined monthly fee and disbursement expense of $1,042 per claim would have extinguished the contingent liability in 1997 when the matters were on the state trial- ready calendar.

The January 1997 order also provided that the provisions of 9 U.S.C. 1 et seq. (The Federal Arbitration Act) would apply to the ordered ADR procedures. But Congress, in this Act, (which relates to the enforcement of arbitration contracts in maritime and commercial matters), only vested the US District Court with jurisdiction to apply its provisions.

In June 2000, the same bankruptcy judge determined respondent/ debtors' estate to the "fully administered" and closed their Chapter 11 case without any resolution of the subrogated claims against the insurer.

iii)The May 18th. 2001 Order of Judge Perlman

The bankruptcy judge justified his denial of petitioners' January 2001 motion in equity to lift the stay on their subrogated state claims, on the basis that he had relinquished jurisdiction to deal with such matters in his January 1997 order imposing the stay in question and authorizing ADR resolution.

"It is clear that the scheme of the ADR procedures instituted by the ADR order was intended to remove from this court authority to deal with disputes raised by the claimants who were subject to the ADR order as is the case for the Spierers."

Infra, at page 43a.

B. The US District Court Proceedings

Petitioners filed an appeal in the US District Court for the Southern District of Ohio against the May 18th. 2001 order of the bankruptcy judge refusing to lift the stay on the state court proceedings. They argued *inter alia*, that the bankruptcy court lacked both Constitutional and Congressional jurisdiction to issue its original January 1997order imposing the stay and ADR procedures in question, and that following *Northwest Cinema Corp.*, 49 BR 479, 480, such issues were properly raised in the District, as opposed to the bankruptcy Court. Oral argument was requested but denied. The District Court denied the appeal on the basis that jurisdictional objections had not been raised in the bankruptcy court. The Court of Appeals later vacated this decision.

C. The US Court of Appeals for the Sixth Circuit

The Court of Appeals recognized that jurisdictional issues could not be waived by the parties, (following this Court's decision on Congressional diversity jurisdiction in *Mitchell v. Maurer*, 293 US 237, 244) and reviewed the bankruptcy judge's January 8th. 1997 order for jurisdictional excess. In doing so, the Court of Appeals interpreted 11 U.S.C. 105 (a) to confer a general grant of subject matter jurisdiction to bankruptcy judges to issue any order, process, or judgement, necessary or appropriate to carry out the provisions of the Bankruptcy Code. (*Infra* at pages 9a-10a). Objections, based on specific statutory restrictions on bankruptcy judges, could be waived, as non- jurisdictional issues. Following its determination that such objections had been waived in the instant case, the Court of Appeals found that jurisdictional review of the order in question was "purely a constitutional question, governed by the line of cases beginning with

Northern Pipeline Construction Co. v Marathon Pipe Line Co., 458 US 50 (1982)."

In applying a single constitutional test the Court of Appeals found that staying the New York State actions, directing resolution by non- binding ADR proceedings, failing which, referral to the Ohio Federal Courts, constituted minimal interference with private rights, merely affecting the timing of their enforcement. (*infra* at page 13a and page 10a footnote 2). The Court of Appeals accordingly found that the bankruptcy judge had jurisdiction to issue the order in question. A subsequent request for *en banc* re- argument was denied.

REASONS FOR GRANTING THE PETITION

A. The Court of Appeal's Decision Conflicts with Decisions of Other Circuits

The Court of Appeal's interpretation of 11 U.S.C. 105 (a), conferring a broad grant of jurisdiction on bankruptcy judges, conflicts with the interpretation of that provision by the Second, Third and Fifth Circuits. Following the interpretation of these circuits, "Power under section 105 is the scope and forms of relief the court may order in an action in which it has jurisdiction" *See Zale*, (Fifth Cir.) *supra*, at 751. The section itself does not create jurisdiction.

The divergent views of the Court of Appeals and the above Circuits, fundamentally impact on the basis of a bankruptcy judge's jurisdiction to act. According to the Sixth Circuit's approach, this basis is 11 U.S.C. 105 (a). As a result, specific Congressional restraints on what bankruptcy judges may hear and determine, are merely tests to determine whether Sec.105 (a) jurisdiction has been properly exercised

in any specific case. On this analysis, failure to object, for example, that a matter is not a "core proceeding", may be waived, as non- jurisdictional.[15] On the other hand, according to the other Circuits referred to, the basis of such jurisdiction lies specifically in those Congressional enactments delimiting the acts of bankruptcy judges. *See In re Johns- Manville*, (Second Cir.) supra, at 63 where "core proceedings" are jurisdictional issues.

B. The Court of Appeals Decision Undermines State Court Jurisdiction

This divergence of views on the jurisdictional effect of 11 U.S.C. 105 (a), has important consequences, for example, the application of the Anti- Injunction Act (28 U.S.C. 2283) and the integrity of state court proceedings.[16] The Court of Appeals view that statutory restrictions on bankruptcy judges are non- jurisdictional issues and may be waived, if not objected to, seriously undermines the Act's prohibitions.

Though 11 U.S.C. 105 (a) has been accepted as an "expressly authorized exception" to the Anti- Injunction Act, (*Davis v. Sheldon*, *supra* at 177) the specific circumstances in which bankruptcy judges may stay state court proceedings

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[15] Complete absence of Congressional grant of authority to bankruptcy judges may also be waived under this analysis. For example, the absence of authority to employ ADR procedures: or to refer matters to the District Court. The absence of concurrent jurisdiction with state courts under 28 U.S.C. 1334 (b,) or the absence of authority to remove state matters under 28 U.S.C. 1452.

[16] The object of the Anti- Injunction Acts since 1793, has been to prevent needless and unseemly conflict between state and Federal courts *See Mitchum v Foster*, 407 US 225 at 232- 233..

under Section 105 (a), have never- the- less to be analyzed in each case. *See Davis v Sheldon, supra*, 178; *In re Baptist Medical Center of New York, supra* 641. Following this view, all statutory restrictions impacting on the imposition of state stays, must be considered and applied as jurisdictional requirements. *See In re Johns- Manville Corp.*, 801 F. 2nd. 60, 63. (2nd. Cir) which specifically considered the question of "core proceedings" as a jurisdictional factor effecting the validity of a state stay.

Applying the Court of Appeals view, however, relevant Congressional restrictions on bankruptcy judges which may impact on the "authorized exception" of 11 U.S.C. 105 (a) to the Act, are waived, unless raised by objection. Thus, in the instant case, no consideration was given to a previous judicial determination that the state court proceedings against the insurer were not part of the Chapter 11 reorganization, or to arguments that they were thus not "core proceedings" in bankruptcy.

In essence, under the Court of Appeals' approach, a party's default in raising timely statutory objections which may effect the Sec.105 (a) exception to the Act, is sufficient justification to exclude further consideration of the Act's prohibitions on state court stays. This seriously subverts the efficacy of the Acts' prohibitions and, in the instant case, undermined state court jurisdiction to determine the timing and adjudication procedures applicable to trial ready cases. The purely constitutional test applied by the Court of Appeals for encroachment by bankruptcy judges on the powers of United States courts, accordingly excluded consideration of Congressional prohibitions on state court encroachments.

If this Court does not resolve the above conflict over the jurisdictional effect of 11 U.S.C. 105 (a), and the Court of Appeals decision is allowed to stand, it will signal a basis for aggrandizing bankruptcy judge jurisdiction beyond its intended Congressional limits and will result, *inter alia*, in increased interference by such judges in state court matters.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-4241

[Filed May 14, 2003]

IN RE: FEDERATED DEPARTMENT STORES, INC., Debtor.	)
CHRISTOPHER SPIERER; MARION SPIERER, Appellants,	)
v.	)
FEDERATED DEPARTMENT STORES, INC.; ALLIED STORES CORPORATION; BLOOMINGDALES DEPARTMENT STORES, INC., Appellees.	)

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati
No. 01-00444
Sandra S. Beckwith, District Judge

JUDGES: Before: MOORE and GIBBONS, Circuit Judges; COHN, Senior District Judge.[1]

OPINION

KAREN NELSON MOORE, Circuit Judge. In an effort to hasten resolution of the Federated Department Stores' and other debtors' bankruptcy estate, the Bankruptcy Court for the Southern District of Ohio ordered those creditors who had litigation pending against the debtors to submit their claims to non-binding arbitration before bringing their claims to court. Creditors were given an opportunity to opt out of this dispute resolution process, and some did. Appellants Christopher and Marion Spierer, however, did not, and the bankruptcy court stayed their state court suit against the debtors until the Spierers had gone through the arbitration process. The Spierers subsequently sought to lift the stay so that they could proceed directly in state court, however, arguing that the stay should never have been imposed. The bankruptcy court denied this motion, and the district court affirmed on the grounds that the Spierers could not challenge the imposition of the stay in their appeal from the denial of a motion to lift the stay. To the extent that the Spierers challenge the bankruptcy court's jurisdiction to impose the stay, we may hear the appeal. Because the stay was within the bankruptcy court's jurisdiction, however, we **AFFIRM** the judgment of the bankruptcy court.

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[1] The Honorable Avern Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

I. BACKGROUND

Claiming that they had suffered injuries as a result of exposure to toxic chemicals in a mattress that they had obtained from the defendants, Christopher and Marion Spierer filed suit against the Federated Department Stores and certain of Federated's subsidiary companies in New York state court in 1987. The Spierers were not the only individuals who were suing the defendants, and on January 15, 1990, the defendants -- now the Debtors -- filed for bankruptcy protection in the U.S. District Court for the Southern District of Ohio. Later that year, having determined that no global settlement of the claims against the Debtors was imminent, the bankruptcy court lifted the automatic stay on all pending litigation. The Spierers were then free to proceed with their claim and apparently began preparing for a trial in New York state court.

Of the thousands of claims that had been brought against the Debtors, all but a few were resolved over the next several years, and in the interest of settling the estate quickly, the Debtors had moved the bankruptcy court to adopt an Alternative Dispute Resolution ("ADR") procedure for any remaining claims. With all parties in interest having been given notice and after holding a hearing, the bankruptcy court agreed to order the remaining claimants, including the Spierers, to bring their claims first to ADR. On January 8, 1997, the bankruptcy court stayed all litigation over personal injury claims then pending against the Debtors. In doing so, the bankruptcy court cited as authority sections 105, 524, and 1141 of Title 11. Section 105 grants bankruptcy courts the power to issue "any order . . . necessary or appropriate" to accomplish the bankruptcy code's provisions. 11 U.S.C. §

105. Section 1141 provides that the confirmation of a reorganization plan vests all of the estate's property in the hands of the debtor, *see* 11 U.S.C. § 1141(b), and section 524(a) states that a discharge in bankruptcy serves as an injunction against actions to collect on the debtor's personal liabilities, *see* 11 U.S.C. § 524(a).

At least one claimant who had objected to the Debtors' ADR proposal was exempted from the ADR process so long as his trial would be commenced by a certain date, but claimants such as the Spierers who had not opposed the proposal were required to submit their claims to arbitration. Claimants could choose whether the arbitration would be binding, and if claimants bringing personal injury actions chose for the arbitration to be non-binding, they could serve notice within ten days of the non-binding decision that they still intended to litigate their claims.

Although the Spierers had not opposed the mandatory ADR procedure before it was adopted, they soon let their feelings on it be known. Having moved to Florida, the Spierers claimed that a medical condition prevented them from traveling to New York for the arbitration. In 1999, the bankruptcy court denied the Spierers' request that the arbitration be ordered to occur in Boca Raton, Florida, as the bankruptcy court determined that the choice of venue for the ADR would best be left to the arbitrator. The bankruptcy court also denied their request that they be exempted from the ADR process altogether and be permitted to litigate without first going through the ADR. Finally, the bankruptcy court made clear that matters governing discovery in the ADR process would be left to the arbitrator. The Spierers filed no notice of appeal from these orders.

The Spierers still objected to the ADR process, however, and moved the bankruptcy court to lift its stay on litigation. In the May 18, 2001 order from which the Spierers now appeal, the bankruptcy court noted that the Spierers had missed their opportunity to opt out of the ADR process and that the ADR would expedite the settlement of the remaining claims. Accordingly, the bankruptcy court refused to lift its prior stay on litigation, and it held that the Spierers were bound to use the ADR process before they could go to court.

The Spierers filed a notice of appeal from that May 18, 2001 order and brought their claim to the district court, which had jurisdiction over the interlocutory appeal pursuant to 28 U.S.C. § 158(a)(3). As they do before this court, the Spierers argued that the bankruptcy court had lacked the power to send their claims to ADR. The district court ruled that this attack was on the January 8, 1997 order imposing the ADR plan, and that the January 8, 1997 order could not be challenged in an appeal from the May 18, 2001 refusal to lift the stay. The district court thus dismissed the appeal.

The Spierers timely appealed to this court, and we have jurisdiction over final orders of the district court under 28 U.S.C. § 158(d). We review the decision of the bankruptcy court directly, reviewing its factual findings for clear error and its legal conclusions de novo. *Harker v. Troutman* (*In re Troutman Enterprises, Inc.*), 286 F.3d 359, 363 (6th Cir. 2002).

II. ANALYSIS

A. Appellate Jurisdiction

Although the Spierers' Notice of Appeal to the district court explicitly stated that they were appealing from the bankruptcy court's May 18, 2001 order denying their Motion to Lift the Stay, and made no mention of the January 8, 1997 order that imposed the stay, the Notice is sufficient to allow them to challenge the bankruptcy court's jurisdiction to impose the stay. To be sure, the May 18, 2001 order was not a final judgment, an appeal from which would necessarily incorporate "'all prior non-final rulings and orders.'" *Newman v. Fed. Express Corp.*, 266 F.3d 401, 404 (6th Cir. 2001) (quoting *Crawford v. Roane*, 53 F.3d 750, 752 (6th Cir. 1995), *cert. denied*, 517 U.S. 1121, 134 L. Ed. 2d 522, 116 S. Ct. 1354 (1996)). And indeed, we construe a notice of appeal from a particular interlocutory order as being limited to that order. *See Crawford*, 53 F.3d at 752. Here, however, by appealing from the court's refusal to lift the stay, the appellants necessarily called into question the court's jurisdiction to impose it. It goes without saying that if the bankruptcy court lacked the power to impose the stay in the first place, then the Motion to Lift the Stay should have been granted. Although it does not appear that the bankruptcy court's jurisdiction to have issued the stay was discussed in the order from which the appeal was taken, courts "review[] judgments, not opinions" or arguments, *see, e.g.*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), so the appellate court reviewing the judgment refusing to lift the stay must consider whether the law required otherwise.

Of course, the Spierers have waived most of the arguments that might support the theory that the stay was improperly imposed. Their Motion to Lift the Stay never suggests, for example, that the stay exceeded the bankruptcy court's statutory power under 11 U.S.C. § § 105, 524, or 1141. Accordingly, the Spierers have waived the argument that imposing the stay violated the statutory restrictions. *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002).

However, the Spierers could not have waived the argument that the January 8, 1997 order imposing the stay exceeded the bankruptcy court's subject matter jurisdiction. "It is hornbook law that parties may not waive into or consent to subject matter jurisdiction which a federal court does not properly have." *Universal Consol. Cos. v. Bank of China*, 35 F.3d 243, 247 (6th Cir. 1994). That the Spierers failed to suggest while before the bankruptcy court that the stay was imposed in violation of *Article III* is irrelevant, as "subject-matter jurisdiction can be challenged at any time." *Taubman Co. v. Webfeats*, 319 F.3d 770, 773 (6th Cir. 2003) (noting that subject matter jurisdiction can even be raised collaterally pursuant to Fed. R. Civ. P. 60(b)(4)).

The Supreme Court's practice in *Mitchell v. Maurer*, 293 U.S. 237, 79 L. Ed. 338, 55 S. Ct. 162 (1934), supports our approach here. In *Mitchell*, a party from Delaware sought in a California federal court to have certain property located in California but owned by a Delaware corporation placed in receivership. *Id.* at 238-39. The district court appointed a receiver, and later, California state officials moved to vacate the appointment, arguing unsuccessfully that state officials had taken possession of the property before the request for the

receiver had been filed in federal court. *See id.* at 239-40. The Supreme Court refused to address the parties' arguments regarding whether the state officials had properly taken possession of the property, *id.* at 241-42, and instead ruled that because the original parties were not sufficiently diverse, the district court had lacked subject matter jurisdiction to appoint the receiver in the first place, *see id.* at 242-44. Having determined that the court had lacked jurisdiction to issue the original order, the Supreme Court ordered the district court to dismiss the case altogether. *Id.* at 244. Just as the Supreme Court could address there whether the lower court had jurisdiction to issue the original order, even when it was the management of that order and not the issuance of it that was on appeal, we have jurisdiction to address whether the lower court had jurisdiction to impose a stay even though it is the refusal to lift the stay, not its issuance, that is on appeal. The jurisdictional question could not have been waived.[1]

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[1] The Debtors do not address the *Mitchell* case, but instead point to what they view as contrary authority. However, we do not read *Celotex Corp. v. Edwards*, 514 U.S. 300, 309 n.7, 131 L. Ed. 2d 403, 115 S. Ct. 1493 (1995), on which the Debtors rely, to stand for the proposition that jurisdiction can be waived. Not only would such a holding be utterly anomolous, *see, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 428, 141 L. Ed. 2d 393, 118 S. Ct. 2091 (1998) (stating that jurisdictional arguments, whether statutory or constitutional, cannot be waived), but the Debtors' reading of *Celotex* ignores its context. The Court in *Celotex* noted that because the district court had properly exercised its jurisdiction under 28 U.S.C. § 1334, there was no need to address whether § 157(c)(1) conferred sufficient authority for the district court's actions. What the respondents "waived" in *Celotex* was not their

Thus we have jurisdiction over the Spierers' claims to the extent that they mount a jurisdictional challenge to the January 8, 1997 order imposing the stay. We address only the Spierers' argument that the stay violates jurisdictional limits, and we make no statement on whether the stay was an abuse of discretion or other non-jurisdictional arguments. The Spierers waived those arguments by not presenting them to the bankruptcy court when they moved it to lift the stay. The Spierers also may not challenge the bankruptcy court's order of September 22, 1997, in which it refused to settle disputes over venue and discovery in the ADR process, because although the Spierers cast their objections to those orders in terms of the bankruptcy court having stripped itself of jurisdiction, those claims are in no way incorporated in the Notice of Appeal from the May 18, 2001 order. That is, the decision on the Motion to Lift the Stay on pending state court litigation does not require any judgment as to whether the ADR process treated discovery and venue issues appropriately.

B. Merits of the Appeal

Whether or not the plaintiffs could meet the high burden of showing that the bankruptcy court abused its discretion in staying the state court litigation under 11 U.S.C. § 105(a), there is no doubt that the statute gives bankruptcy courts jurisdiction to do so. *See, e.g., id.* § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

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argument that jurisdiction did not exist, but that § 157(c)(1) was relevant to the case at all. *See Celotex*, 514 U.S. at 309 n.7.

Accordingly, the jurisdictional challenge to the January 8, 1997 order imposing the stay and requiring the parties to go to ADR before litigating is purely a constitutional question governed by the line of cases beginning with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982).[2]

In *Northern Pipeline*, the Supreme Court struck down a provision of the 1978 *Bankruptcy Act* that gave bankruptcy judges full power to issue final orders and judgments in cases that were only "related to" Title 11 cases. A plurality reasoned that although Congress could empower non-*Article III* judges to issue final orders and judgments in cases involving bankruptcy rights, because those rights existed only because of a congressional grant, Congress could not empower non-*Article III* judges to act with the full "judicial

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[2] The issue is not, as the Spierers frame it, whether the bankruptcy court could "remove" their state litigation to federal court. Although that issue might later arise if either party sought to litigate the tort suit following the arbitration and if the bankruptcy court or district court asserted jurisdiction over their state case pursuant to 28 U.S.C. § 157(c), no federal court has asserted jurisdiction over their state proceedings at this time. The bankruptcy court simply gave the parties notice of the proposed ADR procedure, permitted those who objected to the procedure to opt out of it, and enjoined other proceedings involving the remaining claimants until those claimants had submitted their claims to ADR. Accordingly, the issue before us now is the power to enjoin state litigation, not the power to assert jurisdiction over a state case. That issue, like the related issue of whether, in light of the Debtors' insurance status, the Spierers' personal injury claim would affect the Debtors' estate, would be proper only at a later date. We express no opinion on either issue.

Power of the United States," *U.S. Const. art. III,* § *1*, in cases involving rights that, like the right to recover under state law for a personal injury at issue here, existed independent of any congressional grant. Accordingly, the plurality ruled that the bankruptcy court could not issue a final judgment in a state law contract case brought by a debtor.[3] *See Northern Pipeline*, 458 U.S. at 63-87. In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 92 L. Ed. 2d 675, 106 S. Ct. 3245 (1986), the Court endorsed a case-by-case, functional inquiry into *Article III* challenges:

> Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to *Article III* courts, and conversely, the extent to which the non-*Article III* forum exercises the range of jurisdiction and powers normally vested only in *Article III* courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of *Article III*.

Id. at 851. No one factor predominates. *Id.*

Crucial here is that a bankruptcy court's power to stay other litigation leaves the essential attributes of the nation's

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[3] Congress responded to *Northern Pipeline* by adopting the present version of 28 U.S.C. § 157(c), which permits bankruptcy courts to "hear" a proceeding that is related to a Title 11 case, but which forbids the bankruptcy court from issuing final orders and judgments in such a case. Instead, the bankruptcy court must offer its recommended findings of fact and conclusions of law to the district court, which may issue final judgments itself.

"judicial Power," *U.S. Const. art. III,* § *1*, safely in the *Article III* courts. The federal district court maintains all of its previous powers. Granting the bankruptcy court this ability to stay state court proceedings in no way aggrandizes Congress's power with respect to the judiciary, *see Schor*, 478 U.S. at 850, as *Article III* tribunals maintain oversight of the bankruptcy court's action. The fact that ultimate review of the non-*Article III* tribunal's actions rests in *Article III* courts indicates that the *Article III* courts retain an unquestionably important aspect of their judicial power. *See Norris v. Schotten*, 146 F.3d 314, 325-26 (6th Cir.) (emphasizing importance of *Article III* review of federal magistrate judges' decisions), *cert. denied*, 525 U.S. 935, 142 L. Ed. 2d 287, 119 S. Ct. 348 (1998); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 950-74 (1988) (suggesting that review by *Article III* court is necessary and sufficient condition of reserving appropriate power in *Article III* courts).

Second, the power exercised by the bankruptcy court is not one that must be exercised exclusively within the confines of *Article III*. The order enjoining the state proceedings pending non-binding arbitration does not resolve that litigation, but merely affects its timing. This power to impose a stay is thus far from the "ultimate decisionmaking authority," *Northern Pipeline*, 458 U.S. at 79, that must remain in the *Article III* court. Rather, it is one of the many "functions historically performed by judges," *id. at 80*, that may be statutorily delegated to non-*Article III* judges. Congress can, after all, order certain parties to submit to arbitration with limited *Article III* review without encroaching on the realm of *Article III*, *see Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 87 L. Ed. 2d 409, 105 S.

Ct. 3325 (1985) (upholding statute that required applicants for EPA pesticide permits who cannot agree on how to share costs of certain research to submit to arbitration with only minimal *Article III* review), which suggests that the power to stay proceedings pending non-binding arbitration is not a power exclusive to *Article III*. *Cf. First Fed. Sav. Bank & Trust v. Ryan*, 927 F.2d 1345, 1359 (6th Cir.) ("The appointment of a conservator or receiver is not a 'judicial power' subject to *Article III*."), *cert. denied*, 502 U.S. 864 (1991); *Noriega-Perez v. United States*, 179 F.3d 1166, 1175-76 (9th Cir. 1999) (finding that although ALJ's imposition of a fine "may seem to be within the purview of an *Article III* court, this concern is mitigated because ALJs do not have the authority to enforce the fine"); *In re Clay*, 35 F.3d 190, 193 (5th Cir. 1994) (calling the power to conduct jury trials "the heart of 'the judicial Power'").

With respect to Schor's third and fourth criteria, although the right at issue is an important one, the restrictions imposed on that right are minimal and for important and legitimate purposes. Whereas Congress's power to relegate cases involving "public" rights to non-*Article III* fora is unquestioned, *see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 50-54, 106 L. Ed. 2d 26, 109 S. Ct. 2782 (1989), we should be wary of limiting the ability to enforce rights that exist between private parties and independently of any congressional action, *see Northern Pipeline*, 458 U.S. at 83-84 (plurality); *id.* at 91 (Rehnquist, J., concurring). As suggested above, however, the restriction at issue here is minimal, as it affects not the ability to enforce these private rights, but only the timing of that enforcement. Granting bankruptcy courts this power protects the court's ability to

administer the estate efficiently and other creditors' ability to satisfy their claims.

We thus conclude that the power to stay other pending litigation involving the debtors or the estate is within the bankruptcy court's constitutional jurisdiction.

Finally, to whatever extent the Spierers wish to challenge the denial of their Motion to Lift the Stay on the grounds that, even if the stay had been imposed pursuant to the bankruptcy court's proper powers, the stay should have been lifted in the May 18, 2001 order, their challenge fails. We review a bankruptcy court's refusal to lift a stay for abuse of discretion. *See White v. White (In re White)*, 851 F.2d 170, 174 (6th Cir. 1988). The refusal to lift the stay appears to have been well within the bankruptcy court's discretion. The bankruptcy court noted that the earlier January 8, 1997 order, which required certain remaining claimants to bring their claims in ADR before litigating, had aimed to "expedite the resolution of a relatively few remaining claims." J.A. at 410. Although the Spierers claim that this ADR process imposed an unnecessary hardship on them, arguing that their health would prohibit them from traveling to New York for the hearing and that the arbitrator's proposed alternative of a videoconference was prohibitively expensive, the bankruptcy court did not abuse its discretion in finding that ADR's expeditious procedures outweighed the Spierers' hardships: The Spierers had counsel in New York who presumably could have represented their interests at the ADR, their proposed alternative of litigating in New York state court appears to impose no less of a burden, and under the January 8, 1997 order's ADR plan, the Spierers could still proceed to court even if they participated in the ADR and lost. Further, as the

bankruptcy court noted, at least one other claimant objected to the ADR proposal and was exempted from the process so long as he proceeded in state court in a timely manner; this route appears to have been equally open to the Spierers.

III. CONCLUSION

Because we determine that we have jurisdiction to consider the Spierers' *Article III* challenge to the January 8, 1997 order, we **VACATE** the district court's judgment dismissing the appeal. Because the order refusing to lift the stay was within the bankruptcy court's jurisdiction, however, we **AFFIRM** the judgment of the bankruptcy court.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-4241

[Filed July 9, 2003]

IN RE: FEDERATED DEPARTMENT STORES, INC., Debtors.	)
CHRISTOPHER SPIERER, ET AL., Appellants,	)
v.	)
FEDERATED DEPARTMENT STORES, INC., ET AL., Appellees.	)

JUDGES: Before MOORE and GIBBONS, Circuit Judges; and COHN,* District Judge.

* Hon. Avern Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THESOUTHERN DISTRICTOF OHIO WESTERN DIVISION

Case No. C-1-01-444

[Filed October 31, 2001]

Federated Department Stores, Inc., et al., Debtors/Appellees,	)
vs.	)
Christopher Spierer, et al., Creditors/Appellants.	)

Opinion

This matter is before the Court upon the appeal by Christopher and Marion Spierer from the May 18, 2001, Order of the United States Bankruptcy Court for the Southern District of Ohio denying their motion to lift stay. The relevant history is set forth succinctly by the Bankruptcy Court in its Order and is not the subject of contention. Accordingly, the Court quotes from the Bankruptcy Court's Order:

> In these consolidated Chapter 11 bankruptcy cases, an order confirming the Plan of the Reorganized Debtor was entered January 10, 1992. On December 9, 1996,

the Reorganized Debtors filed Motion for an Order Approving and Authorizing the Implementation of an Alternative Dispute Resolution Procedure for Certain Unresolved Personal Injury Claims and Certain Other Claims ("the ADR motion). In their motion, the Reorganized Debtors alleged that thousands of claims had been filed in these cases, and disposition had been reached with respect to most of them. The ADR motion was directed at 90 personal injury claims and other miscellaneous claims that as of the date of filing remained unresolved. The Reorganized Debtor said that the ADR motion had been instituted because there was a "relatively small number of Claims and [because of] the length of the time the Claims have been pending against the Federated Debtors" such claims could most promptly and efficiently be resolved by ADR. The Reorganized Debtors appended a list of claims which it proposed to submit to the ADR procedure. The Spierers' claim was listed. Notice of the motion was duly given to the listed claimants. By Order filed January 8, 1997, the Court granted the motion of the Reorganized Debtors. That order required that the listed claimants submit their claims pursuant to the ADR procedures which were laid out at length. The Order also included an injunction pursuant to §§105,524, and 1141 of the Bankruptcy Code, which prohibited any proceedings then pending in a forum other than this court.

* * *

On August 6, 1999, then counsel for the Spierers sought an order (1) directing that ADR proceed in

Boca Raton, Florida; (2) permitting the Spierers to file a notice of intention to litigate in lieu of proceeding with the ADR; and (3) requiring that certain insurance information would be furnished to claimants. On September 22, 1999, this court entered an order on that motion. We denied relief to the Spierers with respect to their request that this court direct the location of the ADR procedure. We denied as well the request that the Spierers be allowed to file a notice of intention to litigate without completing the procedure set out in the ADR order. Finally, we denied relief with respect to discovery, holding that this was within the province of the Arbitrator. On February 3, 2000, the American Arbitration Association informed the parties litigating the present claim that (1) . . . parties are required to reveal insurance coverages to claimant, and (2) that hearings would proceed in New York, but that the Spierers could appear by video conference.

Counsel then representing the Spierers was allowed by a New York court to withdraw as their counsel. New counsel, Ian Anderson, filed a notice of appearance on January i0, 2001, in the New York State action of the Spierers. He then appeared here on behalf of the Spierers.

The first filing of the Spierers after the entry of Anderson as their attorney was . . . [a] Motion to Lift the Automatic Stay.

The Spierers moved to lift the stay on equitable grounds. They argued that the "balance of hurts" favored lifting the stay. They also argued that various matters of efficiency

argued in favor of lifting the stay. They did not argue that the Bankruptcy Court had acted without constitutional or other legal authority when it issued the ADR order on January 8, 1997. The Bankruptcy Court denied the Spierer's motion, rejecting their equitable and other arguments. That court did not revisit the propriety of the January 8, 1997, order.

In this appeal of the Bankruptcy Court's May 18, 2001, Order, the Spierers raise three issues. Those issues relate to the January 8, 1997, order. The Spierers ask whether the Bankruptcy Court acted without constitutional authority in requiring arbitration for the Spierers' claims and whether it erred in setting aside a previous order lifting the stay with respect to the claims of the Spierers and others. Finally, they ask whether the Bankruptcy Court abused its discretion by assigning the Spierers' claims to arbitration.

Each of the issues raised by the Spierers on appeal was ripe for resolution as of January 8, 1997. The Spierers did not, however, challenge the order issued by the Bankruptcy Court on that date. Moreover, they did not move for relief from the stay imposed by that order on any of the grounds now asserted for reversal of the Bankruptcy Court's May 21, 2001, Order. As the arguments raised on appeal were not properly before the Bankruptcy Court, this court declines to address them now. *See In re Harshbarger*, 66 F.3d 775, 777 n.3 (6th Cir. 1995) (citing *In re Eagle-Picher Industries*, 963 F 2d 855, 862-63 (6th Cir. 1992)).

In this appeal, the Spierers challenge none of the factual findings or legal conclusions set forth in the order from which the appeal is taken. In short, their present appeal is from the January 8, 1997, order of the Bankruptcy Court and not its

May 21, 2001, order. Accordingly, the appeal is DISMISSED.

IT IS SO ORDERED.

/s/ _____
Sandra S. Beckwith
United States District Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Consolidated Case No. 1-90-00130

Chapter 11
Judge Aug

[Filed June 12, 1990]

Federated Allied Stores
Claims Processing Center
P.O. Box 19550
Portland, Oregon 97219

IN THE MATTER OF:	)
	)
FEDERATED DEPARTMENT STORES, INC.	)
	)
and	)
	)
ALLIED STORES CORPORATION, et al.	)
Debtors	)
	)

DECISION AND ORDER

This matter is before the Court on Debtors' Motion for Order Authorizing Debtors to Compromise or Settle Certain Claims and Controversies (Doc. 826), Debtors' Amended Motion (Doc. 858), and Debtors' companion Motion for an Order Approving Plan for Resolution of Insured Litigation Claims (Doc. 827). The Court also has considered the numerous responses and objections filed. A hearing was held May 24, 1990 and the Court held the record open until May 29, 1990 to allow for reflection and for final written submissions.

The Court has jurisdiction pursuant to 28 U.S.C. §1334(b) and the General Order of Reference entered in this district. This is a core proceeding arising under 28 U.S.C. §157(b)(2)(A),(B),(G) and (O).

By way of background, Debtors and this Court initially favored a global or comprehensive settlement plan for resolving pending claims. Debtors were aware of a least 2000 such claims and the Court was faced with the prospect of conducting hundreds of hearings on motions for relief from stay. Debtor has made a concerted effort to devise a plan for the uninsured claims (Doc. 826) and the insured claims (Doc. 627). The plan to settle the insured claims revolves around a fund which would cap at $12 million. The plan would have the Court maintain the stay on both the insured and uninsured claims for three months or for as long as six months, at Debtors' option.

At the hearing it became clear that the comprehensive settlement was a potential boon to small claimants, but it would be useless or unfair to claimants with large or complex claims. Debtors proposed numerous exclusions and

amendments to the settlement plan at the hearing and in their post-hearing letter (Doc. 1074). This scenario makes the Court increasingly wary of the plan's adequacy and fairness. Also of concern to the Court was the suggestion that the plan could turn into a race to exhaust the $12 million fund. Those claimants fortunate enough to participate would receive quick payment, whereas all remaining claimants would be forced to participate on a *pro rata* basis at the conclusion of the cases. The Court further notes that the many objectors proposed various alternatives to address this problem, Including a blanket lifting of the stay.

The Court also makes special reference to an underlying theme which evolved at the hearing: that many claimants, if not all, were uninformed as to the exact coverage afforded by Liberty Mutual Insurance Company and Liberty Mutual Fire Insurance Company, the Debtors' primary Insurance carriers (collectively, Liberty Mutual), and American Motorists Insurance Company (hereinafter AMI), another Insurer (Doc. 1074, p. 3).

The absence of policy information made it impossible for many claimants to evaluate the wisdom of participating in the settlement plan. The Court agrees that without a detailed knowledge of those Insurance policies, it is impossible for claimants to decide whether the settlement proposals are fair and it is impossible for this Court to decide whether the $12 million fund for insured claims is adequate.

The Court also takes special note of the final response of Liberty Mutual, which raises the specter of the "serious, far-reaching disputes between Liberty and the Debtors...." over defense of lawsuits (Doc. 1095, p.2). At this point the Court,

as well as the claimants only have a vague notion of the underlying dispute between Debtor and Liberty Mutual over coverage. But the Court is not persuaded that putting this dispute "on hold," as Liberty Mutual suggests, is in the best interest of the estate or that such a delay will aid in the reorganization. On the contrary, there is a very real possibility that a comprehensive settlement might but a short-term peace between the Debtor and Liberty Mutual at the long-term expense of claimants who do not participate in the plan.

Upon review of the record, the Court finds the proposals for comprehensive settlements unworkable. Moreover, the proposals will lead to a result of an unacceptable level of selective, pre-plan distributions to un-secured creditors. Such distributions would deviate from the rules of priority and distribution set forth in the Bankruptcy Code, thereby establishing a ranking of priorities within priorities. *In Re Structurlite Plastics Corp.*, 91 B.R. 813, 815 (Bankr. S.D. Ohio 1988.) The Court is mindful of the fundamental principle of bankruptcy law requiring all similarly situated, unsecured creditors to be treated in a like manner throughout the bankruptcy. *In Re Revco D.S., Inc.*, 91 Bankr. 777, 780 (Bankr. N.D. Ohio 1988). It is not apparent that these claims constitute one of the "rare instances" in which the payment of pre-petition debt would be absolutely vital to the reorganization of a Chapter 11 debtor. *In re Structurlite Plastics*, 91 B.R. at 815.

Also, given the nature and progress of the case to date, there appears to be no compelling reason to engage in a sifting-out process of these unsecured claims. Debtors are striving to maintain a steady course of business as usual and

recent reports indicate the companies are achieving their goals. These claims, in the main, were a cost of doing business before the reorganization. In no way do these claims against the Debtors resemble the *A.H. Robins Co.* or the *Johns-Manville Corp.* tort claims which precipitated those reorganizations.

The Court finds the reasoning in *Bock Laundry Machine Co.*, 37 B.R. 564 (Bankr. N.D. Ohio 1984), to be persuasive. In *Bock Laundry* the Court granted limited relief from stay to plaintiff-creditors who had products liability actions against the debtor in a Chapter 11 proceeding. Claimants were permitted to liquidate their claims, but collection was postponed. The Court explained that courts have viewed the opportunity to litigate liability as a "significant right" which cannot be easily set aside, despite the existence of a bankruptcy proceeding. *Id.* at 566. *See also, In re Continental Airlines, Inc.*, 61 B.R. 758, 779 (S.D. Tex. 1986); *In re Todd Shipyards Corp.*, 92 B.R. 600, 603 (Bankr. D. N.J. 1988). As in *Bock Laundry*, this Court has balanced the interest of the estate against the hardships to the creditors, who have a "significant right" to timely litigate their cases on an equal footing with all other claimants.

Debtors and Liberty Mutual maintain that the settlement plan should be approved because it would save attorney fees and other expenses associated with defending lawsuits. (Doc. 827, p. 16). This argument is unpersuasive when viewed in perspective because of the plan's hardship upon claimants and its questionable manipulation of litigation expenses. Other courts have observed that litigation expenses do not constitute an injury sufficient to justify the enjoining of litigation against a debtor, particularly when the debtor is an extremely large

corporation. *In re Todd Shipyards Corp.*, 92 B.R. at 603. Also, Debtors already have saved significant costs since January 15, 1990 when Debtors filed their petitions and the automatic stay froze all cases. While costs will be resumed when the automatic stay is lifted, there will be a counterbalancing savings because of the elimination of litigation under §362, the Bankruptcy Code's provision for litigating the many pending motions for relief from stay. Further, if the vast majority of these cases settle, as is customary, those settlement procedures will cost the estate the same amount, with or without a comprehensive settlement plan.

Also of significance is the Court's unwillingness to maintain a stay which potentially allows insurers to enjoy a windfall at claimants' expense. Again, the insurers already have received a substantial cost savings by the five-month delay caused by this reorganization. These insurance companies are not part of this reorganization and they presumably accepted premiums as the *quid pro quo* for providing insurance. *In re White*, 73 Bankr. 983, 985 (Bankr. D.C. 1987).

In view of the foregoing, this Court grants a limited relief from stay so that all claimants may litigate or settle their claims to liquidation, in the full light of discovery. In particular, Debtors are ordered to provide copies of the applicable insurance policies to claimants without delay.

Following liquidation, however, payment by Debtors will be postponed until a plan of reorganization is confirmed. A total relief from the stay would not be in the best interests of the estate. If the stay were dissolved, creditors who had

obtained judgments or settlements would be able to proceed against assets of the estate without regard for the claims of other creditors. *In re Bock Laundry*, 37 B.R. at 568. Consequently, each party who obtains a judgment or settlement should file a proof of claim with this Court.

The Court further finds that the remaining stay of execution of judgments or settlements applies only to Debtors, not to the insurers. Accordingly, collection of judgments or settlements for the insured portions of claims may proceed as usual following liquidation.

The Court also will consider making priority payments to a narrow class of claimants. At the hearing it became obvious that certain claimants, especially the very elderly or handicapped, are experiencing extreme hardship by delays in resolving their claims or lawsuits. For that reason, in cases of extreme hardship where the claim is liquidated, this Court will consider priority payments, if it can be shown that such payments will not jeopardize the reorganization.

Accordingly, Debtors' motions for a comprehensive settlement plan are denied. The Court grants a limited relief from stay allowing all claimants to liquidate their claims against Debtors, but postponing collection against Debtors until a plan of reorganization is confirmed. Claimants may collect without delay any portion of settlements or judgments insured by Liberty Mutual or AMI.

IT IS SO ORDERED.

/s/ J. Vincent Aug, Jr.
J. Vincent Aug, Jr.,
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Consolidated Case No. 1-90-00130
Case No. 1-90-00173

Hon. Burton Perlman
Chapter 11

[Filed January 9, 1997]

IN THE MATTER OF:	)
	)
FEDERATED DEPARTMENT STORES,	)
INC. and ALLIED STORES	)
CORPORATION, et al.	)
Debtors	)
	)
	)
GOLD CIRCLE, INC.	)
	)

ORDER AUTHORIZING AND APPROVING ALTERNATIVE DISPUTE RESOLUTION PROCEDURE FOR CERTAIN UNRESOLVED PERSONAL INJURY CLAIMS AND CERTAIN OTHER CLAIMS

THIS MATTER is before the Court on the motion dated December 9, 1996 (the "Motion") of the above-captioned Reorganized Debtors and Gold Circle, Inc. (collectively the "Federated Debtors"), for an order (the "Order") authorizing and approving Alternative Dispute Resolution Procedure for certain unresolved personal injury claims and certain other

claims (the "ADR Procedure"); the Court having reviewed the Motion and the ADR Procedure; a hearing having been held on the Motion on January 8, 1997 (the "Hearing"); the Court finding that the legal and factual bases set forth in the Motion establish cause for the relief granted herein and it appearing that approval of the ADR Procedure by the Court and implementation of the ADR Procedure by the Federated Debtors is in the best interest of the Federated Debtors, its claimants and other parties in interest; and the Court having otherwise been fully advised in the premises;

THE COURT HEREBY FINDS THAT:

A. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §57(b)(2)(A), (B) and (O).

B. Adequate notice of the Motion and the Hearing has been given to all parties in interest and no other or further notice need be given.

C. The Federated Debtors desire to implement the ADR Procedure in order to avoid additional delay and expense in resolving the Claims (as defined in the Motion and the ADR Procedure), to limit the necessity of this Court's intervention in resolving the Claims, and to allow the Federated Debtors to enter Final Decrees in their remaining chapter 11 cases.

D. The Federated Debtors have proposed the ADR Procedure in good faith and the implementation of the ADR Procedure is a proper business judgment of the Federated Debtors.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The ADR Procedure, which is attached hereto as Exhibit 1, is hereby approved in its entirety and its terms are incorporated into this Order pursuant to section 105(a) of the Bankruptcy Code and Rule 9019(c) of the Federal Rules of Bankruptcy Procedure.

2. The Federated Debtors are hereby authorized to implement the ADR Procedure and to submit the Claims to the ADR Procedure. To the extent the Federated Debtors determine at a later date that there exists other unresolved claims in addition to the Claims, the Federated Debtors are permitted, at their sole discretion, to submit such claims to the ADR Procedure. If a settlement of a Claim which is pending prior to or during the ADR Procedure is not consummated, the Federated Debtors are authorized to submit or resubmit such Claim to the ADR Procedure by serving an ADR Notice upon such claimant.

3. The ADR Notice, which is attached to the ADR Procedure, and a summary of the ADR Procedure (the "ADR Summary"), which is attached hereto as Exhibit 2, must be served upon all claimants that are subject to the ADR Procedure within sixty (60) days of the entry of this Order unless otherwise ordered by this Court.

4. In the event that the Federated Debtors do not receive from a claimant an ADR Notice with a proper settlement offer (the "Settlement Offer") on or within thirty (30) days of the date the ADR Notice is served on the claimant by the

Federated Debtors as provided in the ADR Procedure, such Claim shall be deemed disallowed.

5. In the event a claimant timely responds to the ADR Notice with a Settlement Offer and the Federated Debtors fail to respond to the Settlement Offer within sixty (60) days from the date the ADR Notice is served, such Claim shall be deemed allowed in the amount of the Settlement Offer.

6. In the event that the Federated Debtors make a counteroffer (the "Counteroffer") to the Settlement Offer, the claimant must respond to the Counteroffer by accepting or rejecting the Counteroffer (the "Counteroffer Response"). The Federated Debtors must receive the Counteroffer Response on or within thirty (30) days from the date the Counteroffer is served by the Federated Debtors upon the claimant (the "Counteroffer Response Period"). If the Federated Debtors do not receive the Counteroffer Response within the Counteroffer Response Period, the Claim shall be deemed allowed in the amount of the Counteroffer.

7. The Federated Debtors shall serve a notice upon a claimant that its Claim has been deemed allowed or disallowed pursuant to the ADR Procedure.

8. In the event that a Claim is not resolved through the Offer Exchange Procedure (as that term is defined in the ADR Procedure), such Claims shall proceed to mandatory mediation (the "Mediation Procedure"). The mediation proceedings shall be subject to the procedures set forth in the ADR Procedure.

9. In the event that a Claim is less than $250,000 and is not resolved through the Offer Exchange Procedure and then the Mediation Procedure, such Claim shall proceed to mandatory arbitration. The arbitration proceeding shall be binding if the claimant consents. If the claimant does not consent to binding arbitration, the arbitration shall be non-binding. The arbitration proceeding shall be subject to the procedures set forth in the ADR Procedure.

10. In the event that a Claim is $250,000 or greater and is not resolved through the Offer Exchange Procedure and then the Mediation Procedure, such Claim shall proceed to mandatory arbitration. The arbitration shall be binding if both the Federated Debtor and the claimant consent to binding arbitration. If either or both the Federated Debtor and the claimant do not consent to binding arbitration, the arbitration proceeding shall be non-binding. The arbitration proceeding shall be subject to the procedures set forth in the ADR Procedure.

11. The Federated Debtors will serve an information package regarding the mediation procedures and arbitration procedures established in the ADR Procedure upon a claimant if its Claim proceeds to mediation or arbitration under the ADR Procedure.

12. Neither party shall have the right to appeal a binding arbitration award rendered pursuant to the ADR Procedure to this Court or the United States District Court for the Southern District of Ohio (the "District Court") for Claims governed by 28 U.S.C. § 157(b)(5) except on the grounds set forth in Section 10 of the Federal Arbitration Act. Any further appeal shall be governed by the Federal Arbitration Act. The parties

shall have ten (10) days from the date a binding arbitration award is served upon the parties to appeal such award.

13. The parties shall have ten (10) days from the date a nonbinding arbitration award is served upon the parties to file and serve upon the opposing party by overnight mail a notice of intent to litigate the Claim with this Court or the District Court for Claims governed by 28 U.S.C. § 157(b)(5). In the event that a notice of intent to litigate is not timely filed and served by the parties, a non-binding arbitration award shall automatically become binding upon the parties. In the event that a timely notice to litigate is filed and served, this Court, or the District Court where appropriate, shall conduct a *de novo* review of the Claim.

14. The fees and administrative costs of any mediation or arbitration proceeding under the ADR Procedure will be shared equally by the Federated Debtors and the claimant. The administrative fee charged by AAA for mediation and/or arbitration shall be shared equally and must be paid to AAA by the parties within twenty (20) days after the filing of an arbitration notice or mediation notice with AAA as provided in the ADR Procedure. If a party fails to timely pay the administrative fee, the Claim will be allowed in the amount of the last settlement offer in the Offer Exchange Procedure of the party who paid the administrative fee. The hourly fees and costs of the mediator and arbitrator will be charged and paid at a later time. If a party fails to pay its share of the hourly fees and costs of the arbitrator or mediator, the Claim will be allowed in the amount of the last settlement offer in the Offer Exchange Procedure of the party who paid its share of the fees and costs.

15. To the extent that any proceedings are pending in a forum other than this Court involving any Personal Injury Claims, such proceedings are hereby stayed and enjoined under the Plan and sections 105, 524 and 1141 of the Bankruptcy Code so that such Personal Injury Claims may proceed to resolution through the ADR Procedure.

16. Claimants shall be prohibited from filing amended proofs of claim after the entry of this Order.

17. Simmons Company ("Simmons") filed a Partial Opposition to the Motion on January 6, 1997 (the "Simmons Objection"). Pursuant to the Simmons Objection, Simmons consented to the ADR Procedure so long as the claims of both Marion Spierer and Christopher Spierer (claim no. 11579) (collectively, the "Spierer Claims") are subject to the ADR Procedure. The ADR Procedure has been amended to included the Spierer Claims in their entirety. Therefore, the Simmons Objection is moot and hereby denied.

18. Dr. David Brodtman ("Brodtman") filed an Affidavit in Opposition to the Motion on December 30, 1996 (the "Brodtman Objection"). The Federated Debtors and Brodtman agree to except the Brodtman claims (claim nos. 18586, 18587 & 18732) (collectively, the "Brodtman Claims") from the ADR Procedure so long as a trial is scheduled to commence regarding the Brodtman Claims on or before September 30, 1997. If a trial is not commenced on or before September 30, 1997, the Brodtman Claims will be submitted to the ADR Procedure. Notification of a scheduled trial shall be filed with the Bankruptcy Court by Brodtman and served upon counsel for the Federated Debtors on or

before September 30, 1997. Extension of the September 30, 1997 deadline is subject to further Order of this Court.

Dated: Cincinnati, Ohio
January 9, 1997

/s/ _____
Honorable Burton Perlman
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Consolidated Case No. 1-90-00130

Chapter 11
Judge Burton Perlman

[Filed May 18, 2001]

In Re:	)
	)
FEDERATED DEPARTMENT STORES,	)
INC. and ALLIED STORES	)
CORPORATION, et al.	)
Debtors	)
	)

ORDER RE SPIERERS' (1) OBJECTION TO MOTION TO WITHDRAW FUNDS and (2) MOTION TO LIFT STAY

In these consolidated Chapter 11 bankruptcy cases, an order confirming the Plan of the Reorganized Debtor was entered January 10, 1992. On December 9, 1996, the Reorganized Debtors filed Motion for an Order Approving and Authorizing the Implementation of an Alternative Dispute Resolution Procedure for Certain Unresolved Personal Injury Claims and Certain Other Claims ("the ADR motion). In their motion, the Reorganized Debtors alleged that thousands of claims had been filed in the cases, and disposition had been reached With respect to most of them. The ADR motion was directed at 90 personal injury claims and other miscellaneous claims that as of the date of filing remained unresolved. The

Reorganized Debtor Said that the ADR motion had been instituted because there were a "relatively small number of Claims and [because of] the length of time the Claims have been pending against the Federated Debtors" such claims could most promptly and efficiently be resolved by ADR. The Reorganized Debtors appended a list of claims which it proposed to submit to the ADR procedures. The Spierers' claim was listed. Notice of the motion was duly given to the listed claimants. By Order filed January 8, 1997, the court granted the motion of the Reorganized Debtors. That order required that the listed claimants submit their claims pursuant to the ADR procedures which were laid out at length. The Order also included an injunction pursuant to §§105, 524, and 1141 of the Bankruptcy Code, which prohibited any proceedings then pending in a forum other than this court. The Order concludes with recitation of an agreement between the Reorganized Debtors and claimant Dr. David Brodtman to except him from the ADR procedures on condition that his claim be litigated promptly.

On August 6, 1999, then counsel for the Spierers sought an order (1) directing that ADR proceed in Boca Raton, Florida; (2) permitting the Spierers to file a notice of intention to litigate in lieu of proceeding with the ADR; and (3) requiring that certain insurance information would be furnished to claimants. On September 22, 1999, this court entered an order on that motion. We denied relief to the Spierers with respect to their request that this court direct the location of the ADR procedure. We denied as well the request that the Spierers be allowed to file a notice of intention to litigate without completing the procedure set out in the ADR order. Finally, we denied relief with respect to discovery, holding that this was within the province of the Arbitrator. On

February 3, 2000, the American Arbitration Association informed the parties litigating the present claim that (1) the Simmons company and the other parties are required to reveal insurance coverages to claimant, and (2) that hearings would proceed in New York, but that the Spierers could appear by video conference.

Counsel then representing the Spierers was allowed by a New York court to withdraw as their counsel. New counsel, Ian Anderson, filed a notice of appearance on January 10, 2001, in the New York State Supreme Court action of the Spierers. He then appeared here on behalf of the Spierers.

The first filing of the Spierers after the entry of Anderson as their attorney was an objection to a motion filed January 18, 2001, by debtors seeking authorization to withdraw available excess funding from disputed claim reserves. The objection was on the basis that no provision had been made for the claim of Christopher Spierer in computing what needed to be retained by the Reorganized Debtors. The Spierers coupled with the objection, Cross Motion to Lift the Automatic Stay. A hearing was held on the objection, first on February 27, 2001, continued to March 13, 2001. With respect to the objection it was the position of the Spierers that they had filed separate proofs of claim in the bankruptcy cases. Debtors disputed this, contending that there was only a single proof of claim filed for both of them. The evidence before the court establishes that a single proof of claim was filed on behalf of Christopher Spierer and Marion Spierer, and there was no showing of a separate filing on behalf of Christopher. Accordingly, the objection to the motion of the Reorganized Debtors to withdraw funds is overruled, and the

motion of the Reorganized Debtors to withdraw funds is granted.

Motion to Lift Stay

The Spierers have moved to lift the stay which is in force and which prohibits them from litigating their claim other than through the mandated ADR process. They wish to be free of the stay so that they can continue litigating their claim in the state courts of New York. In support of their motion, they argue that principles of equity favor lifting the stay since the hardships of the Spierers outweigh the interests of the Reorganized Debtors; lifting the stay will remove the claim of Simmons, USA; excessive costs will be involved in the ADR proceeding compared to costs in the state court action; the claim of Dr. David Brodtman was exempted from ADR and the court should follow that course in the present instance; and the New York Supreme Court issued an order permitting the Spierers to restore their actions to the trial calendar within nine months and three days from the date on which this court lifts it stay. The Reorganized Debtors opposed the motion, first, on grounds that denial of the motion is required by the theory of the law of the case in view of the court's order of September 22, 1999. In addition, Reorganized Debtors in their memorandum recite facts to support their position that delays in this matter are of the making of the Spierers. Counsel for the Spierers then responded with his own declaration of facts which he says show that delays have been caused by Reorganized Debtors. The Spierers have provided the court with a memorandum of law which states that the "present motion is brought 'for cause' pursuant to 11 U.S.C. §362(d) (1)." Because the stay presently in place is not one entered pursuant to 11 U.S.C. §362, the authorities regarding

"cause" do not here apply. As noted above, the stay arising by reason of the order filed January 8, 1997, was imposed pursuant to §§105, 524, and 1141 of the Bankruptcy Code. The authorities provided by the Spierers on the lift of stay issue are therefore not useful here.

The January 8, 1997 order was entered as a means for expediting the resolution of a relatively few remaining claims at that time. That expedition was the objective is clear from the provision in the order excepting Dr. Brodtman's claim on condition that a scheduled trial commence by September 30, 1997. This provision came into the order because Dr. Brodtman had timely filed an affidavit in opposition to the motion of Reorganized Debtors to activate ADR procedures. The Spierers, by contrast, made no timely objection, and they were and are bound by that order.

Regarding the position of the Reorganized Debtors that the present motion must be denied upon application of the theory of law of the case, the Spierers are technically correct that that argument is misplaced. In the earlier motion brought by the Spierers, the relief sought was the right to file a notice of intent to litigate without going through the arbitration process. That relief still was within the scope of the ADR procedures. The Spierers' present motion seeks to except them entirely from the ADR procedures, that is, they seek an exception to the January 8, 1997 order. While the relief sought in the two motions is different, the objective is the same. That objective is to be excused from ADR procedures. Here, the parties in unsworn statements have presented their versions of what has happened in regard to the claim of the Spierers before the arbitrator. It is not the province of this court to make a decision regarding the conduct of the respective parties before

the arbitrator. We adhere to the following comment from our order of September 22, 1999:

> It is clear that the scheme of the ADR procedures instituted by the ADR Order was intended to remove from this court the authority to deal with disputes raised by claimants who were subject to the ADR Order, as is the case for the Spierers. The ADR Order vests in the Arbitrator the authority to resolve disputes such as those here sought to be brought to the bankruptcy court by the Spierers. Particularly questions of the location of hearings are for the Arbitrator to resolve. Claimants here seek to involve the court as an appellate tribunal to review the Arbitrator's decision on this score. Claimants suggest no basis which would justify the court's intervention in this manner.

There is nothing in the motion presented by the Spierers which warrants the relief they seek, that at this time, four years after the entry authorizing ADR procedures, that they be excepted from the operation of that order.

The motion of the Spierers for relief from stay is denied.

So Ordered.

/s/ _____
BURTON PERLMAN
U.S. BANKRUPTCY JUDGE

Supreme Court U.S.
FILED
NOV 5 - 2003
OFFICE OF THE CLERK

No. 03-506

In The

Supreme Court of the United States

CHRISTOPHER SPIERER, and MARION SPIERER,

Petitioners,

v.

FEDERATED DEPARTMENT STORES, INC., ALLIED STORES CORPORATION, and BLOOMINGDALE'S, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Sixth Circuit Court of Appeals correctly determine that the Bankruptcy Court had jurisdiction to stay the Petitioners' state court litigation and require Petitioners to participate in non-binding alternative dispute resolution?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondent Federated Department Stores, Inc. is a publicly held corporation, has no parent corporation, and there is no publicly held company that owns 10% or more of the corporation's stock.

Respondent Allied Stores Corporation was merged into Federated Department Stores, Inc., pursuant to a Plan of Reorganization.

Bloomingdale's, Inc. is a wholly-owned subsidiary of Federated Retail Holdings, Inc. who is in turn a wholly-owned subsidiary of Federated Department Stores, Inc.

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BRIEF IN OPPOSITION

Respondents Federated Department Stores, Inc., Allied Stores Corporation, and certain of their subsidiaries, including Bloomingdale's, Inc. request that this Court deny the Petition for Writ of Certiorari filed by Petitioners seeking review of the decision of the Sixth Circuit Court of Appeals that affirmed the Bankruptcy Court's jurisdiction to stay Petitioners' state court litigation pending completion of non-binding alternative dispute resolution.

STATEMENT OF THE CASE

A. Background.

On January 15, 1990, Federated Department Stores, Inc., Allied Stores Corporation and certain of their subsidiaries, including Bloomingdale's, Inc., each commenced a voluntary case under Chapter 11 of the Bankruptcy Code. (Apx 121).[1] Pursuant to orders of the Bankruptcy Court, the Chapter 11 cases were consolidated for procedural purposes only and were jointly administered. *Id.* On October 28, 1991, the Debtors filed with the Bankruptcy Court their Third Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code (the "Plan"). *Id.* On January 10, 1992, the Bankruptcy Court entered its Findings of Fact, Conclusions of Law and Order Confirming the Plan. *Id.* The effective date of the Plan was February 4, 1992 (the "Effective Date"). *Id.* The Plan provided for the creation of Federated, Allied, Bloomingdale's and

[1] "Apx __" refers to the Joint Appendix filed in the Sixth Circuit Court of Appeals.

other Debtors as reorganized Debtors (the "Reorganized Debtors") from and after the Effective Date. *Id.*

B. Alternative Dispute Resolution and the Petitioners' Claim.

On December 9, 1996, the Reorganized Debtors filed a Motion for an Order Approving and Authorizing the Implementation of an Alternative Dispute Resolution Procedure for Certain Unresolved Personal Injury Claims and Certain Other Claims (the "ADR Motion") (Apx 406). In the ADR Motion, the Reorganized Debtors stated that thousands of claims had been filed in the bankruptcy cases, and that disposition had been reached with respect to most of them. *Id.* The ADR Motion was directed at the few remaining claims that as of the date of filing of the ADR Motion remained unresolved. *Id.* The claim of Marion & Christopher Spierer (the "Spierers" or "Petitioners") was listed as being unresolved. *Id.* Petitioners had filed a proof of claim in 1990 based on allegations that they were injured by exposure to toxic chemicals contained in a mattress manufactured by Simmons USA and supplied to them by Reorganized Debtors prior to the Petition Date. Notice of the ADR Motion was given to the Spierers and others whose claims had not been resolved. (May 18, 2001 Decision, Apx 406).

On January 9, 1997, the Bankruptcy Court entered its Order authorizing and approving an alternative dispute resolution procedure (the "ADR Procedure") for certain unresolved personal injury claims and certain other claims (the "1997 ADR Order") including the Spierers' claim. (ADR Order, Apx 189). The 1997 ADR Order required that the listed claimants submit their claims pursuant to the

ADR Procedures. *Id.* The ADR Procedures required each Disputed Claim (as defined in the 1997 ADR Order) to undergo a three step process including (also as defined in the 1997 ADR Order): 1) Offer Exchange Procedure; 2) Mediation Procedure; and 3) arbitration proceedings. (*Id.* at ¶¶ 4-10, Apx 191-92). The 1997 ADR Order directs that only upon completion of the arbitration proceedings may a party to a Disputed Claim serve a notice of intent to litigate the Disputed Claim before an appropriate court. (*Id.* at ¶ 13, Apx 193). The Order also included an injunction pursuant to §§ 105, 524 and 1141 of the Bankruptcy Code, which prohibited any other proceeding then pending in a forum other than the Bankruptcy Court. *Id.*

C. Petitioners' Attempts to Avoid Alternative Dispute Resolution.

On August 6, 1999, the Spierers brought a motion (the "Marber Motion") in the form of an Affidavit of Paul A. Marber, their former attorney. (R. 1, Declaration of Debtors' Counsel, Exhibit D, Apx 233). The Marber Motion requested an order (1) directing that the ADR proceed in Boca Raton, Florida; (2) permitting the Spierers to file a Notice of Intention to Litigate and proceed with litigation in the New York Supreme Court in lieu of proceeding with the ADR Procedures; and (3) requiring that certain insurance information be furnished to claimants. *Id.*

With respect to the first request, the Spierers have claimed from at least November 1998, just one week prior to the original arbitration hearing in this matter, that they are unable to travel to New York City for the mandatory

arbitration hearing due to their failing health.[2] (*Id.* at ¶¶ 6-7, Apx 239). Counsel for the Spierers described their medical limitations as follows:

> It is apparent from the reports prepared by the Spierers' doctors that they are highly susceptible to sever allergic reactions and, therefore, must remain in controlled environments. As a result, their ability to travel is greatly curtailed since exposure to chemicals common in public settings are detrimental to their health.

(*Id.* at ¶ 10, Apx 242). The Spierers therefore requested that the arbitration proceeding be held in an "environmentally safe location" in Boca Raton, Florida, in the proximity of their home. *Id.*

The Spierers' refusal to attend arbitration in New York City, as directed in the ADR Order (Bankruptcy Court's Order dated September 22, 1999, at page 2, Apx 325) and numerous requests to the arbitrator to hold the arbitration hearing in Florida caused more than a two year delay in resolving the Spierers' claim. Letters exchanged between counsel for the Spierers, Simmons Company, Reorganized Debtors and the American Arbitration Association ("AAA") demonstrate the tortured route the Spierers' personal injury case has taken. (Exhibits F through J to Debtors' Counsel's Declaration, Apx 316-52).

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[2] It should be noted that the Spierers' refusal to attend an arbitration hearing in New York *predates* the Marber Motion in which the Spierers requested that their case be allowed to proceed in the New York State Supreme Court.

In a letter dated June 10, 1999, attached to the Debtors' Counsel's Declaration as Exhibit F, the Spierers' former counsel informed AAA that his clients had located an "environmentally safe location" in Boca Raton, Florida, at which the arbitration proceedings could take place. (*Id.*, Apx 316). The Spierers placed the condition on use of the premises that "those participating in the arbitration refrain from wearing any cologne, perfume, scented body soaps, hair spray or any other scented products prior to and during the proceeding." *Id.* In response, counsel for the Simmons Company, participating in the arbitration pursuant to the ADR Order, objected via a letter dated June 16, 1999, on the grounds that the Spierers refused to identify the environmentally safe location and that the convenience of the Spierers did not warrant causing all other parties to the arbitration to travel to Florida for the arbitration hearing. (*Id.* at Exhibit G, Apx 318).

On September 22, 1999, the Bankruptcy Court entered its Order upon the Marber Motion (the "Marber Order") (Apx 325). It denied relief to the Spierers with respect to their request that the Bankruptcy Court direct the location of the ADR Procedure stating that the location was under the authority of the Arbitrator. *Id.* It denied as well the request that the Spierers be allowed to file a notice of intention to litigate without completing the procedure set out in the ADR Order. *Id.* The Bankruptcy Court held that as "to the claimants' second ground for relief, that they be allowed to file a notice of intention to litigate, that likewise is denied. *Id.* The ADR Procedures do provide for the filing of such a notice, but a predicate is required. That predicate is that arbitration occur first." *Id.* It also denied the request for discovery as that was in the province of the Arbitrator. *Id.*

Not satisfied with the Bankruptcy Court's direction in the Marber Order, the Spierers continued on their bizarre quest of avoiding arbitration in New York City. (Letter dated January 7, 2000, attached to the Declaration as Exhibit H, written by counsel for the Simmons Company as an objection to yet another request to AAA by the Spierers that they not be compelled to participate in arbitration proceedings in New York City, Apx 320). The January 7, 2000, correspondence provides a summary of the long and tortured procedural history of the Spierers' claim. It also indicates the Spierers' relentless campaign to thwart the efforts of the Bankruptcy Court and the Arbitrator to settle the Spierers' underlying personal injury case.

Counsel for the Spierers ultimately requested and was allowed to withdraw as their counsel by a New York state court. New counsel, Ian Anderson, filed a notice of appearance in the New York state court.

On February 3, 2000, the Arbitrator relented by ordering that the arbitration hearing be held in New York City but that the Spierers could attend from Florida via videoconferencing. (AAA letter dated February 3, 2000 attached as Exhibit I to the Declaration, Apx 348). Not satisfied with this compromise, the Spierers objected to the Arbitrator's decision causing additional correspondence from the Simmons Company. (Letter of counsel for Simmons Company dated February 17, 2000, attached to the Declaration as Exhibit J, Apx 350).

D. Petitioners' Motion to Lift the Stay.

This matter came before the Bankruptcy Court again on January 18, 2001, when Reorganized Debtors filed their

Fifth Motion for Order Authorizing Withdrawal of Available Excess Funding from Disputed Claims Reserve. (Apx 121). The Spierers objected to the motion on February 16, 2001. (Cross-Motion, Apx 132). Apparently undeterred by the Marber Order and the Arbitrators' decision, the Spierers also included with their objection a Cross-Motion seeking to lift the automatic stay so that their personal injury claim could proceed in New York exempt from the ADR Procedures:

> The Court ordered non-binding alternative dispute resolution cannot proceed due to the excessive costs involved in such proceedings. Due to the fact that numerous expert scientific and medical witnesses necessary for such proceedings come from different parts of the country, the Arbitrator has, on information and belief, requested that the proceedings be conducted by video link. Movants, who are in receipt of disability payments, are unable to meet their portion of the costs of this process. As such the arbitration has been unable to proceed. Due to the complex scientific and medical issues involved in movants [sic] State claims, resolution by the State Court, will be both more efficient and less costly than the present non-binding alternative dispute resolution.

(*See Id.* at ¶ 8(c), Apx 136).

Reorganized Debtors objected to the Cross-Motion, first on grounds that denial of the Spierers' request for affirmative relief was required by the theory of the law of the case. (Response to Cross-Motion, Apx 150). The Marber Order specifically held that the Spierers had to complete the ADR Procedures before they could litigate. In addition, the Reorganized Debtors objected because any delays

claimed by the Spierers in the ADR Procedures were of the Spierers' own making.

A hearing was held first on February 27, 2001, and was continued to March 13, 2001. The Bankruptcy Court, by Order of May 18, 2001, overruled the Spierers' objection and granted Reorganized Debtors' motion to withdraw funds. (The "May 18, 2001 Decision", Apx 406). The Spierers do not appeal from this portion of the Bankruptcy Court's Order.

In the same Order, the Bankruptcy Court also overruled the Spierers' Motion to Lift the Stay. *Id.* The Bankruptcy Court reiterated that the purpose of the ADR Order was a means for expediting the resolution of a relatively few remaining claims. *Id.* The Court also noted that the Spierers had the opportunity to object to the ADR Procedures and having failed to do so were "bound by that order." (*Id.* at p. 6, Apx 411). The Court ultimately held that "[t]here is nothing in the motion presented by the Spierers which warrants the relief they seek, that at this time, four years after the entry authorizing ADR procedures, that they be excepted from the operation of that order." (*Id.* at p. 7, Apx 412).[3]

---

[3] On June 25, 2001, the Bankruptcy Court entered a Final Decree under section 350(a) of the Bankruptcy Code closing the Federated, Allied and Bloomingdale's chapter 11 cases. Pursuant to the Final Decree, the Bankruptcy Court retained jurisdiction over any issues related to the Spierer Appeal.

E. The District Court Proceedings.

The Spierers appealed to the District Court for the Southern District of Ohio on May 29, 2001. After briefing, District Court Judge Sandra S. Beckwith, in a written decision, dismissed the appeal on October 31, 2001. (Judgment in a Civil Case, Apx 522). Specifically, the District Court held "[e]ach of the issues raised by the Spierers on appeal was ripe for resolution as of January 8, 1997. The Spierers did not, however, challenge the Order issued by the Bankruptcy Court on that date. Moreover, they did not move for relief from the stay imposed by that Order on any of the grounds now asserted for reversal of the Bankruptcy Court's May 18 [sic], 2001, Order." (Opinion at p. 3-4, Apx. 520). The Court explained that in this appeal, "the Spierers challenge none of the factual findings or legal conclusions set forth in the order from which the appeal is taken. In short, their present appeal is from the January 8, 1997, order of the Bankruptcy Court and not the May 18 [sic], 2001 order."

F. The Sixth Circuit Court of Appeals.

The Spierers then appealed to the Sixth Circuit Court of Appeals. The Court of Appeals recognized that the jurisdictional challenge to the January 8, 1997 Order imposing the stay and requiring the parties to go to ADR before litigating was a constitutional question. Addressing the issue, the Court held that the power to stay other pending litigation involving the debtors' estate was within the Bankruptcy Court's constitutional jurisdiction. Having dismissed the jurisdictional challenge, the Court held that the Bankruptcy Judge's decision to refuse to lift the stay was well within the Bankruptcy Court's discretion. Consequently the Court affirmed the decision of the

Bankruptcy Court. A request for consideration *en banc* was denied.

Petitioners now request that this Honorable Court consider this matter as well. The Petition for Writ of Certiorari should be denied.

REASONS SUPPORTING DENIAL OF THE PETITION

A. The Bankruptcy Court Has Authority to Refer Cases to Alternative Dispute Resolution.

The Spierers challenge the Bankruptcy Court's general authority to refer matters to ADR. They are simply wrong as there is ample support, both statutory and case law, underlying the Bankruptcy Court's decision to refer this matter to ADR.

First, there is the Alternative Dispute Resolution Act of 1998 ("ADR Act"). The ADR Act defines alternative dispute resolution as "any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration." 28 U.S.C. § 651(a). The ADR Act requires that each United States district court "authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy" and further requires that each district court "devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district." *Id.* § 651(b).

Even without the express reference to "adversary proceedings in bankruptcy," the ADR Act arguably applies to bankruptcy courts, just as it does to district courts, because bankruptcy courts are units of the district courts. *See* 28 U.S.C. § 151 (1993).

Second, Rule 16 of the Federal Rules of Civil Procedure also provides authority for referral to ADR. It authorizes a court to "take appropriate action, with respect to . . . settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule." Fed. R. Civ. P. 16. Disputes in bankruptcy are either contested matters governed by Fed. R. Bankr. P. 9014, or are adversary proceedings, governed by the Federal Rules of Civil Procedure, found in Part VII of the Bankruptcy Rules (7001 through 7087). For adversary proceedings, Bankruptcy Rule 7016 specifically makes Rule 16 applicable. For contested matters, Bankruptcy Rule 9014 allows the court to "direct that one or more of the other rules in Part VII shall apply." Thus, Fed. R. Civ. P. 16 provides authority for bankruptcy courts to require the parties to use ADR, in both adversary proceedings and contested matters.

Third, section 1123 of the Bankruptcy Code likewise provides support for the Bankruptcy Court's 1997 ADR Order. Subsections 1123(a)(3) and (4) require a plan of reorganization to specify and provide for the treatment of each classified claim. 11 U.S.C. § 1123(a)(3), (4). Subsection 1123(b)(6) allows the plan to "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). Under this authority, at least where the affected class has accepted the plan, bankruptcy courts have confirmed plans of reorganization which provide for the liquidation of claims

through ADR-driven claims resolution facilities. *See e.g.*, *In re A.H. Robins,* 88 B.R. 742 (E.D. Va.), *aff'd*, 880 F.2d 694 (4th Cir. 1988), *cert. denied*, 493 U.S. 959 (1989). Indeed, a class of claims may submit itself and its dissenters to mandatory, nonbinding ADR under a confirmed plan. 11 U.S.C. § 1123(b)(6); *In re A.H. Robins Co.*, 880 F.2d at 698 (94% of tort claimants voted to accept the plan and its nonbinding ADR Procedures for the resolution of claims); *In re Drexel Burnham & Lambert Group, Inc.*, 130 B.R. 910, 920 (S.D.N.Y. 1991) (settlement establishes the legal, equitable, and contractual rights of all class members regarding the debtors' liability; provided the plan gives the class precisely the consideration the settlement establishes to be the collective rights of the class, the class is unimpaired).

Fourth, the inherent authority of federal courts, including bankruptcy courts, permits them to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. The doctrine of "inherent authority" was introduced into American jurisprudence in *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). The Supreme Court acknowledged its continued validity in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630, 631 (1962). *See Ex parte Peterson*, 253 U.S. 300, 312 (1920) (federal courts enjoy the "inherent power to provide themselves with appropriate instruments required for the performance of their duties.").

Finally and more importantly, section 105 of the Bankruptcy Code, as the Sixth Circuit expressly held, authority for a bankruptcy court to establish an ADR system to resolve disputes. 11 U.S.C. § 105. It empowers the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the

provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a); *see Erti v. PaineWebber Jackson & Curtis, Inc. (In re Baldwin-United Corp. Litig.)*, 765 F.2d 343, 348 (2d Cir. 1985) ("(T)he Bankruptcy Court . . . may use its equitable powers to assure the orderly conduct of the reorganization proceedings"). Section 105(d) of the Bankruptcy Code, provides statutory support for the use of mandatory, nonbinding ADR Procedures in bankruptcy cases:

> The court, on its own motion or on the request of a party in interest, may –
>
> (1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and
>
> (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically. . . .

11 U.S.C. § 105(d). The statute also provides a nonexclusive list of orders that may be entered by the court to expedite the case, such as setting a date by which a debtor shall file a plan of reorganization and disclosure statement. The legislative history indicates that this amendment "authorizes bankruptcy court judges to . . . manage their dockets in a more efficient and expeditious manner." H.R. 5116, 103d Cong., 2d Sess., 140 Cong. Rec. 10752, 10764 (1994). The statute gives bankruptcy judges considerable latitude to compel parties to submit their dispute to ADR prior to trial as a means of expeditiously and economically handling the case.

The Sixth Circuit correctly found that the Bankruptcy Court's exercise of that power was within the confines of Article III. U.S. Cons. Art. III, § 1. First, "Granting the bankruptcy court this ability to stay state court proceeding in no way aggrandizes Congress's power with respect to the judiciary." Second, the power exercised by the Court does not resolve the state court litigation but only affects the "timing" of the litigation. Finally, the restrictions imposed are minimal and for important and legitimate reasons.

B. There Is No Conflict Among The Circuits

Petitioners assert that there is a conflict with the Sixth Circuit's decision in the case at bar and the other Courts of Appeals. Petitioners do not, however, cite to any cases where a court was faced with the same issues involved here and that court reached the opposite conclusion. Simply put, there is no conflict.

Petitioners instead try to argue that the Sixth Circuit's "general" interpretation of 11 U.S.C. §105 is broader that the other circuits' interpretation. Such a difference, even if true, would not create an issue worthy of this Court's review.

C. The Bankruptcy Court Was Correct in Denying the Spierers' Motion To Lift the Stay and Did Not Abuse its Discretion.

The Bankruptcy Court did not abuse its discretion in requiring the Spierers to follow through with the ADR process. The Bankruptcy Court, after reviewing the pleadings, simply came to the conclusion that nothing in the

Spierers' motion entitled them to avoid the ADR Procedures. As the Sixth Circuit noted, this decision was well within the Bankruptcy Court's discretion.

CONCLUSION

The Bankruptcy Court did not abuse its discretion in requiring Petitioners to try to resolve their personal injury claims through non-binding alternative dispute resolution. Petitioners' state law claims have been pending since the mid-1980s and should hopefully benefit from the process. It is also evident from the myriad of statutory and other legal support, that the Bankruptcy Court had the necessary authority to require Petitioners to participate in ADR. Because the Bankruptcy Court's actions only briefly delayed the state court case, Petitioners' argument that the Court exceeded its constitutional powers fails. For the foregoing reasons, Respondents respectfully request that the Petitioners' writ of certiorari be denied.

Dated: November 5, 2003

Respectfully submitted,

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CHRISTOPHER SPIERER; MARION SPIERER,
Petitioners,

v.

FEDERATED DEPARTMENTAL STORES, INC.;
ALLIED STORES CORPORATION;
BLOOMINGDALES DEPARTMENT STORES, INC.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The decision of the Sixth Circuit should not be allowed to stand, because it misinterprets the "powers" referred to in 11 USC 105(a) as a grant of jurisdiction to US bankruptcy judges, while at the same time determined Congressional restrictions on such judges, to be non- jurisdictional factors, which can be waived. The decision creates confusion between the judicial powers of a US bankruptcy judge and subject matter jurisdiction. In the present case, this resulted in the Sixth Circuit condoning interference in state court proceedings by a US bankruptcy judge who exceeded Congressional restrictions and seriously prejudiced Petitioners' rights to a state trial of their personal injury claims.

Respondents' Brief in Opposition to the Petition for Writ of Certiorari also demonstrates the confusion between the powers of US bankruptcy judges and their subject matter jurisdiction. This confusion is highlighted by the fact that the Second, Third and Fifth Circuits, unlike the Sixth Circuit, do not interpret the 11 USC 105(a) "powers" as a grant of jurisdiction to US bankruptcy judges. Clarification of this and related issues raised in the Petition, is of importance to the enforcement of both private rights and state rights.

FACTUAL ALLEGATIONS

Respondents make numerous tendentious assertions of fact in their Brief in Opposition which are not germane to the basis of this petition but which seek to place petitioners in an unfavorable light. (Res. Br. 3- 6) Petitioners are, for example, alleged to be pursuing a "relentless campaign to thwart the efforts of the Bankruptcy Court and the Arbitrator to settle" [their] "underlying personal injury case." (Res. Br. 6) These and similar assertions are denied and the letters of petitioners'

former attorney, Paul Marber, of 3/6/2000 (APX 387) and 6/29/1999, (APX 301), which delineate the difficulties in dealing with respondents' attorneys, are referred to.

REASONS FOR GRANTING THE WRIT

1. UNIFORM COMPLIANCE WITH CONGRESSIONAL LIMITATIONS ON BANKRUPTCY JUDGES

It is important that Congressional regulation of US bankruptcy judge jurisdiction is uniformly applied throughout all of the US Federal Judicial Circuits. Congress has *inter alia,* sought to regulate such jurisdiction in the context of "core proceedings". If the Sixth Circuit's decision is allowed to stand, compliance with such Congressional regulation may be waived or disregarded by agreement between parties in that Judicial Circuit, but not in others.

"Core proceedings" in bankruptcy are defined as matters which constitute public rights created by Federal statute, but not private rights. See, ***In re Royal***, 197 BR 341, 347- 348. Congress has placed restrictions on US bankruptcy judges from dealing with non- core proceedings, especially where the determination of personal injury claims is involved. See, 28 USC 157(b)(2)(B) and(O). In addition, US bankruptcy judges have no jurisdiction to deal with "related non- core proceedings, unless the District Court specifically refers such matters to them "with ***the consent of all the parties*** to the proceedings". Absent this, only the District Court can enter orders in related non- core proceedings. See, 28 USC 157(c)(2) and(c)(1).

Respondents do not deny in their Reply Brief, that in June 1990, US bankruptcy judge Aug determined that Petitioners'

state subrogated claims against Respondents' insurer, Liberty Mutual, ***were not part of respondents Chapter 11 reorganization***. Nor do they deny that the subsequently confirmed 1992 Plan of Reorganization exempted personal liability claims against Liberty Mutual from its provisions and operation.

Respondents also do not deny that no consent was given at any time to the District Court to refer Petitioners' state claims to US bankruptcy judge Perlman as a related non- core proceeding.

It is clear that Perlman's 1997 order staying Petitioners' subrogated personal injury claims against Liberty Mutual, and forcing them into ADR procedures, (failing which, reference to his court, or the Ohio District Court for ultimate determination), violated specific Congressional restrictions on the jurisdiction of bankruptcy judges.

Unlike the Sixth Circuit, the Second, Third and Fifth Circuits consider bankruptcy judge jurisdiction in terms of "core proceedings" under 28 USC 157, not under the provisions of 11 USC 105(a), See, for example, ***In re Johns- Manville Corp***. 801 F 2nd. 60, 63- 64 (Second Cir.) According to this approach, such Congressional limitations cannot be waived.[1]

If the Sixth Circuit's decision in the present matter is allowed to stand it will create an uneven enforcement of Congressional regulation of US bankruptcy judge

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[1] Like the Congressional regulation of diversity jurisdiction under 28 USC 1332, such issues "cannot be waived or overcome by agreement by the parties". ***Mitchell v. Maurer*** 293 US 237 at 244.

jurisdiction. Congressional regulation under 28 USC 157, for example, can be rendered nugatory in the Sixth Circuit in cases where parties default in objecting to jurisdictional excess. This opens the door not only to the weakening of District Court control and oversight of US bankruptcy judges, but to the aggrandizement of their jurisdiction by private agreement between the parties.

2. CONFUSION OF JUDICIAL POWERS WITH SUBJECT MATTER JURISDICTION

The Sixth Circuit's decision creates confusion between a US bankruptcy judge's judicial powers and subject matter jurisdiction.[2] Respondents Brief in Opposition reflects this confusion, but only addresses one aspect of bankruptcy judge Perlman's 1997 order, namely the use of ADR procedures to resolve personal injury claims. Respondents do not address the fundamental question of subject matter jurisdiction under 28 USC 157(b)(2)(B) and(O) (core proceedings) and 28 USC 157(c)(1) and (c)(2), (related non- core proceedings). They are also silent on the bankruptcy judge's lack of Congressional authority to refer matters to the District Court on the failure of ADR procedures. [3]

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[2] By contrast the Fifth Circuit's approach in matter of ***Zale Corp.*** 62 F.3rd. 746, 751 carefully distinguishes between the judicial power and jurisdiction of US bankruptcy judges..

[3] US bankruptcy judges have no jurisdiction to refer cases to the District Court. See, ***Centrust Savings Bank v. Love*** 131 BR 64 , 66, citing ***Benchic v. Century Entertainment Corp***. 20 BR 126, 127. It is the District Court which refers cases to US bankruptcy judges. See ***Celotex Corp. v. Edwards*** 514 US 300 ;115 S. Ct. 1493 at 1498.

Respondents reference to 11 USC 105(d) as a source of authority for ADR resolution of personal injury claims. (Res. Br. 13), confuses a bankruptcy judge's judicial powers with subject matter jurisdiction, since 11 USC 105(d)(1) and(2) only address matters to be included in pre- trial conference orders. [4]

But the resolution of personal injury claims are non- core proceedings under 28 USC 157(b)(2)(B) and (O) and US bankruptcy judges can only issue orders in such matters on specific referral by the District Court following the consent of all parties. (See 28 US 157(c)(2))

The confusion is further evident in respondents' associated contentions on "inherent authority" (Res. Br. 12) and Rule 16 of the Federal Rules of Civil Procedure (Res. Br. 11), as sources of ADR authority for bankruptcy judges. In the latter regard, Rule 16(c)(9) FRCP [5] like 11USC 105(d), refers to pre- trial conference procedures. Significantly, in the present case, bankruptcy judge Perlman convened no pre- trial conference in 1997 before determining respondents' adversarial motion for a stay and reference to ADR.

Respondents remaining contentions on possible sources of ADR authority for US bankruptcy judges over personal injury claims, not only confuse judicial powers with subject matter jurisdiction but are also irrelevant to the specific facts

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[4] In fact, the list of such orders under 11 USC 105(d)(2)(A) and (B) (i) - (vi), does not specifically include the authorization of ADR procedures.

[5] Made applicable to adversary proceedings in bankruptcy by Rule 7016 of the Federal Rules of Bankruptcy Procedure.

of the petition. For example, respondents rely on 11 USC 1123(b)(6) which requires a plan of reorganization to include "any other appropriate provision" not inconsistent with the Bankruptcy Code. Respondents contend generally, that reorganization plans can provide ADR mechanisms to liquidate claims.(Res. Br. 11- 12). While this is correct, it not only confuses powers with subject matter jurisdiction, but has no relevance to the facts in the case, since:

a) Bankruptcy judge Aug previously exempted personal injury claims against Liberty Mutual from the Chapter 11 bankruptcy reorganization, because, being relatively few, they did not exhaust the insurer's liability cover.

b) Debtors' 1992 reorganization plan, accordingly, did not provide ADR remedies for personal injury claims.

c) Bankruptcy judge Perlman's 1997 order was made five years ***after*** final confirmation of respondents' reorganization plan. [6]

d) The ***A.H. Collins***, Dalkon Shield cases, referred to by respondents, concerned a mass tort bankruptcy in which the personal injury claims would have exceeded the available insurance cover. The ***District Court*** in Collins, accordingly approved a reorganization plan in which personal injury claimants could ***choose*** to obtain percentage payments of their

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[6] Judge Perlman's order was not intended to, and did not alter the 1992 reorganization plan, which had been substantially consummated by 1997 and could not be modified. See 11 USC 1127(b).

claims from the debtors assets, under the plan's ADR procedures, (called the "Claims Resolution Facility"), ***or*** sue debtors insurers in the state courts for whatever amounts they might recover. [7]

Respondents further reference to 28 USC 651, (Alternative Dispute Resolution Act) as a source of authority for Perlman's 1997 ADR order is problematic since the act only came into operation in 1998.(Res. Br. 10, 11) As indicated in petitioners' petition, page 5, no Congressional authority existed in 1997 for such procedures. [8]

The substantial confusion which the Sixth Circuit's decision creates between the judicial powers and subject matter jurisdiction of US bankruptcy judges, and the contrary approach of the Second, Third and Fifth Circuits, requires clarification by this Court.

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[7] See ***In re A.H. Robins*** 880 F. 2nd. 684 at 701

[8] It is uncertain whether, or to what extent the1998 provisions for such procedures apply directly to US Bankruptcy judges. Since the 1998 enactment of 28 USC 654(a) mirrors the referral by consent provisions of 28 USC 157(c)(2), it would appear that the ADR procedures may only be used by US bankruptcy judges on specific referral from the District Court, following the consent of the parties. Even if the 1998 provisions applied in 1997, which they did not, there was no consent to any District Court referral. Further, petitioners' personal injury claims exceeded the monetary limit on ADR procedures, contained in the present 28 USC 654(c), by several $ millions.

3. UNIFORM APPLICATION OF CONGRESSIONAL ANTI- INJUNCTION ACT PROVISIONS

The Sixth Circuit's finding that Congressional restrictions on US bankruptcy judges can be waived, as non- jurisdictional factors, impacts on the uniform enforcement of the Anti-Injunction Act (28 USC 2283). Though the provisions of 11 USC 105(a) are broad enough to include stays on state court proceedings and have been accepted as an "expressly authorized exception" to the Anti- Injunction Act, the exemption only applies if bankruptcy judges issue such stays in the "proper circumstances". See ***Davis v Sheldon*** 691 F. 2nd. 176, 177-178; ***In re Baptist Medical Center of New York*** 80 BR 637, 641.

According to the approach of the Second, Third and Fifth Circuits, 11 USC 105(a), does not create jurisdiction, and "proper circumstances", in the form of subject matter jurisdiction, must be sought in Congressional restrictions on US bankruptcy judges. See ***In re Johns- Manville Corp***. 801 F 2nd. 60, 63, where the Second Circuit stated that:

> "Section 105(a) does not, however broaden the bankruptcy court's jurisdiction, which must be established separately under 28 USC 157."

In reviewing the appropriateness of the bankruptcy judge's stay, the Sixth Circuit's decision contained no consideration of the Congressional restrictions contained in 28 USC 157, since it found that all such restrictions could be, and were, waived in the instant case.[9] In the Second, Third and Fifth

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[9] Petitioners specifically urged the Sixth Circuit, in both written and oral argument, to consider the Congressional restrictions

Circuits, such Congressional restrictions are jurisdictional. They consequently cannot be waived and must be considered in determining the appropriateness of such stays and the 11 USC 105(a) exemption to the Anti- Injunction Act.

The Sixth Circuit's decision thus creates a lack of uniformity in the application of the Anti- Injunction Act, in that Judicial Circuit, in cases where parties are deemed to have waived such Congressional restrictions. In such cases, the determination of "proper circumstances", exempting the operation of the Anti- Injunction Act, does not include a review of Congressional restrictions.

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contained in 28 USC 157, in the context of the appropriateness of the1997 order. Even if the Sixth Circuit was correct in finding that the order did not violate Article 111 requirements, (which is denied), there was never- the- less an absence of Federal subject matter jurisdiction under 28 USC 157. The case relied on by the Sixth Circuit in applying a constitutional test, namely ***Commodity Futures Trading Commission v Schor*** 478 US 833, was not a bankruptcy case and dealt with a different problem, namely, whether a set of Congressional provisions departed from Article 111 requirements.

CONCLUSION

This Court should grant this petition and resolve the far reaching difficulties which the Sixth Circuit's published decision creates for the uniform administration of the US Bankruptcy Code.

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(4)

Supreme Court, U.S.
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No. 03-506

In the Supreme Court of the United States

CHRISTOPHER SPIERER; MARION SPIERER,
Petitioners,

v.

FEDERATED DEPARTMENTAL STORES, INC.;
ALLIED STORES CORPORATION;
BLOOMINGDALES DEPARTMENT STORES, INC.,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR REHEARING

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INTRODUCTION

On December 8, 2003, this Court denied petitioners' petition for certiorari. The published decision of the US Court of Appeals for the 6th Circuit, concerned the scope of bankruptcy jurisdiction-- an area of law involving legislative courts which is replete with "arcane distinctions and confusing precedents".[1] In the present matter, the 6th. Circuit deemed waived, relevant jurisdictional statutes of Congress regulating bankruptcy judges, and applied its own test for jurisdiction. In their petition for certiorari petitioners showed that the writ was necessary to resolve conflicts within the Circuits and to maintain uniformity in the application of the Bankruptcy Code and the Anti- Injunction Act. These were not issues however, which this Court wished to address. Accordingly, petitioners hereby petition for a rehearing pursuant to Rule 44. 2 of the Supreme Court Rules. In support thereof, petitioners refer to other substantial grounds warranting a writ of certiorari, namely judicial infringement of congressional powers.

JUDICIAL INFRINGEMENT OF CONGRESSIONAL POWERS

At the start of debtor- respondent's Chapter 11 bankruptcy proceedings in 1990, bankruptcy judge Aug annulled further bankruptcy jurisdiction over petitioners' state actions to recover damages from debtor's insurer. Federal jurisdiction was initially created by debtors' bankruptcy, but the insurer's third party liability to petitioners was not part of debtors'

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[1] ***Northern Pipeline Construction Co. v Marathon Pipe Line Co.***, 458 US 50 at 90.

personal liability, or part of their Chapter 11 proceedings.(Cert. Pet. 28a, 29a).[2]

Accordingly there was no Federal bankruptcy jurisdiction over these state claims seven years later in 1997, (either by operation of the law or otherwise) which permitted another bankruptcy judge to exercise jurisdiction and stay the actions as "core proceedings" in Chapter 11 bankruptcy, "pursuant to 28 USC 157 or 1334". (Cert. Pet. 31a)

Petitioners' failure to object to the lack of jurisdiction in 1997 could not therefore re- confer or vest non- existent Chapter 11 bankruptcy jurisdiction over their state actions. Yet this was the finding of the 6th Circuit which stated that...."Their Motion to Lift the [judicial] Stay never suggests, for example, that the stay exceeded the bankruptcy court's statutory power under 11 USC Secs.105, 524, or 1141. Accordingly, the Spierers have waived the argument that imposing the stay violated the statutory restrictions." (Cert. Pet. 7a) [3]

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[2] The insurer's liability was not affected by debtors' subsequent discharge from Chapter 11 bankruptcy in 1992, since the latter were only nominal defendants in the state action. See, 11 USC 524 (e); ***In re Doar***, 234 BR 203, 204- 205.(N D Ga. 1999)

[3] In support of this approach, the 6th. Circuit merely referred to the general prohibition against raising new matters on appeal, citing ***Overstreet v. Lexington- Fayette Urban County Govt.***, 203 F 3d. 566, 578. (Cert. Pet. 7a) This prohibition, however, does not extend to jurisdictional issues. See ***Mitchell v. Maurer***, 293 US 237, 244. Further, the lack of jurisdiction over the state actions had already been determined in 1990.

The bankruptcy court "power" referred to by the 6th Circuit is dependent on, and flows from, specific statutory jurisdiction contained in 28 USC 157, upon which the 1997 bankruptcy judge relied. See, ***In re John- Manville Corp***, 801 F 2d. 60, 63 (2nd. Cir.).[4] In essence there is no substantive difference between, for example, Congressional diversity restrictions, contained in 28 USC 1332, and the restrictions relating to "cases under Chapter 11", contained in 28 USC 157. Both are premised on specific requirements of fact which are not capable of being waived or regulated by litigants.[5] In deeming that statutory restrictions in bankruptcy can be waived, the 6th Circuit placed in question the extent of Congress's authority to regulate the activity of bankruptcy judges.

Congress possesses plenary powers under Article 111, Section 2 of the Constitution to establish inferior Federal courts. This vests Congress with the authority to dispose of judicial power, or jurisdiction. See, ***Turner v. Bank of North America.*** 1799, 4 Dall.8, 10. Congress may therefore withhold or restrict the jurisdiction of inferior Federal courts on account of what it deems "proper for the public good".

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[4]The other jurisdictional ground relied on by the 1997 bankruptcy judge, namely, 28 USC 1334, is a general statute which vests Chapter 11 bankruptcy jurisdiction exclusively in the US District Courts.

[5] "Unlike an objection to venue, lack of Federal jurisdiction cannot be waived. An appellate Federal Court must satisfy itself not only of its own jurisdiction but also of that in the lower court in a case under review." ***Mitchell v. Maurer***, supra at 244.

See, ***Cary v. Curtis***, 1845 3 How. 236, 245. [6]

Originally Congress vested exclusive jurisdiction in bankruptcy proceedings in the inferior Federal District courts. See, 28 USC 1334 (a). In 1978 however, Congress sought to establish United States Bankruptcy Courts as separate courts of record, in each judicial district. See 28 USC 151 (a), (repealed). As such, Congress created bankruptcy judges with wide jurisdictional powers over civil proceedings arising under Chapter 11. Following this Court's decision in ***Northern Pipe Line Construction Co. v. Marathon Pipeline Co.***, supra, Congress withdrew such jurisdiction and limited it to "core proceedings" in bankruptcy, namely matters only concerning public rights created by Federal statute. See 28 USC 157 (b) (1), (2) (B)& (O); ***In re Royal***, 197 BR 341, 347- 348.

28 USC 157 was thus enacted by Congress as a jurisdictional statute, foreclosing certain aspects of bankruptcy judge jurisdiction. Although in its published decision the 6th Circuit does not challenge the constitutionality of 28 USC 157, restricting jurisdiction in Chapter 11 cases, it never the less effectively substituted its own test for those in 28 USC 157.

Under the constitutional separation of powers principle, the three branches of government are not simply separate and autonomous, but are enjoined to adhere to interdependence and reciprocity. See, ***Youngstown Sheet & Tube Co., et al. v. Sawyer***, 343 US 579, 635. The 6th Circuit's finding that

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[6] Subject only to due process requirements of the Fifth Amendment. See, ***Battaglia v. General Motors Corp.***,169 F. 2d. 254, 257 (1948, 2nd. Cir.)

congressional restrictions on bankruptcy judges may be waived and the substitution of its own test for jurisdiction violate both Congress's plenary powers to regulate such matters and the constitutional requirement of reciprocity. In addition, this finding opens the door to conferring *de facto*, Article 111 powers on such judges by waiver or direct agreement between the parties.

Petitioners' state actions against the insurer were clearly not within the congressional parameters of Chapter 11 proceedings as determined in 1990 by bankruptcy judge Aug. Moreover, since they were personal injury actions, they were not mattes which a bankruptcy judge could determine or refer to arbitration or authorize referral to the District Court for determination. See 28 USC 157 (b)(2)(B) & (O); 28 157 USC (c)(2).[7]

If the 6th Circuit, like bankruptcy judge Aug, had applied the congressional requirements for jurisdiction in Chapter 11 proceedings, including the specific requirements of 28 USC 157, it would clearly have found that there was no Federal subject matter jurisdiction in 1997 over Petitioners' state actions. Moreover, in 1997 Congress had not authorized the use of arbitration in bankruptcy proceedings nor, granted bankruptcy judges powers to authorize the referral of matters to the District Court for adjudication.

The test which the 6th Circuit devised for jurisdiction was far broader than the specific requirements enacted by Congress and included, *inter alia*, general considerations relating to the possible effect of the 1997 order on Petitioners'

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[7] See Pet. Cert. 34 a- 35 a, paras. 10 to 13 for the relevant portions of the 1997 Order.

state claims. (Pet. Cert. 12a - 13a). Such considerations were at best subjective, if not speculative, and overlooked important factors affecting the final outcome of such claims.

Specifically, in finding that the effect of the 1997 order on the state claim was " minimal" and therefore within the scope of bankruptcy jurisdiction, (Pet. Cert 12a - 13a), the 6th Circuit overlooked the following important factors:

a) The fact that the order provided no mechanism for the return of Petitioners' cases to the New York State courts. (Pet. Cit. 34a- 35a)

b) This Court's own views on the deleterious effects of delay on witnesses and evidence. See ***Clinton v. Jones***, 520 US 681, 707- 708

c) The imposed fees for the AAA arbitration procedures, and the draconian consequences for the state claims on Petitioner's inability to pay. (Pet. Cert. 35a, para. 14)[8]

d) The fact that ultimate forum of the Ohio District Court, has no connection with, and does not represent the vicinage or community in which the New York State personal injury claims arose.

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[8] In 1997 a US Administrative Judge found that Petitioners' medical conditions were linked to the chemical exposure allegedly caused by Respondents and that as a result, they were disabled. Petitioners accordingly receive a total monthly disability income of $2,154.

e) The fact that New York State Law is favorable to important aspects of petitioners' claims while Federal Law is not.[9]

REASONS FOR GRANTING REHEARING

Petitioners, Mr. and Mrs. Spierer, are just ordinary Americans who have been badly served by the administration of justice. Though this Court can no longer resolve all Federal cases and do justice to all litigants, it should not remain silent in this case. A serious Federal question arises from the 6th Circuit's approach to bankruptcy jurisdiction. Whether by error or design, the 6th Circuit's published decision calls into

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[9] The difference arises in the evaluation of expert evidence in a complex case such as Petitioners' which involves a toxic tort. New York State law does not follow the trilogy of Federal decisions on the interpretation of Federal Rule of Evidence 702, namely ***Daubert v. Merrell Dow Pharmaceuticals***, 509 US 579; ***General Electric Co. v. Joiner***, 522 US 136 and ***Kumho Tire Co. v. Carmichael***, 526 US 137. New York State has not adopted these cases but follows an earlier 1923 decision on expert evidence in ***Frye v. US***, 293 F 1013 (DC Cir.). The difference is material; under the ***Dauber, Joiner, Kumho*** trilogy, Federal judges act as "gatekeepers" for the admissibility of ***all*** expert testimony , including medical testimony. Under, ***Frye***, such "gatekeeper" activities are limited to a restricted class of ***scientific*** evidence. Since an important part of Petitioners' cases will turn on the expert testimony of medical doctors, Petitioners face a greater risk litigating in Federal courts than in the New York State courts. See "Trial Journal"; Association of Trial Lawyers of America, March 2001, p.19, 20. "*plaintiffs who litigate in federal court face expensive battles against long odds. Indeed, it is fair to say that **Daubert** has made trying cases in federal court a riskier and more expensive enterprise than at any time in the last 50 years.*" N. Miltenberg.

question the efficacy of Congressional regulation of Chapter 11 bankruptcy proceedings and creates uncertainty about the limits of bankruptcy judge jurisdiction.

The 6th Circuits' finding that statutory restrictions on bankruptcy judges can be waived will bedevil bankruptcy proceedings in the future until this Court is compelled to intervene. By that time much damage will have been done. By acting now, the chaos generated by this decision will be limited and petitioners may obtain some measure of redress. By taking up this important national issue, this Court can ensure that justice is afforded to ordinary citizens.

CONCLUSION

The petition for rehearing should be granted, and on rehearing a writ of certiorari should be issued.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

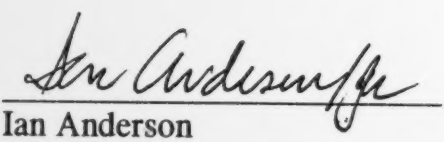
I, Ian Anderson, certify as follows:

1. I am the attorney for Petitioners in this case. I prepared this Petition For Rehearing of Petition For Writ of Certiorari.

2. Pursuant to Rule 44.2 of the Supreme Court Rules, I certify that I have limited this Petition for Rehearing to intervening circumstances of a substantial or controlling effect, or to other substantial grounds not previously presented.

3.This Petition is presented in good faith and not for the purpose of delay.

Dated December 29, 2003



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